

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

APRIL TERM, 1939.

No. 7446

493

SPECIAL CALENDAR.

EDWARD COUPE, HENRY LYNCH, APPELLANTS,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED JUNE 20, 1939

PRINTED DECEMBER 8, 1939

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1939.

No. 7446

EDWARD COUPE, HENRY LYNCH, APPELLANTS,

vs.

UNITED STATES, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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1 Endorsed: United States Court of Appeals for
 the District of Columbia Filed Jun 20 1939 Joseph
W. Stewart, Clerk

Notice of Appeal, Criminal

District Court of the United States for the District of
Columbia

Criminal No. 63146

UNITED STATES OF AMERICA

VS.

EDWARD COUPE, HENRY LYNCH

Notice of Appeal

Edward Coupe—3118 No. 17th St. Arlington Va

Henry Lynch—1039 33rd St N W Wash D C (Name
and address of appellant)

Denny Hughes 402 6 St N W Wash D C (Name and ad-
dress of appellant's attorney)

Offense Viol Sec 863—863-a D. C. Code as amd.

Date of judgment June 19—1939.

Brief description of judgment or sentence

#1—6 mos to 1 yr 1 day

#2—5 mos to 6 months

Name of prison where now confined, if not on bail

I, the above-named appellant, hereby appeal to the Court
of Appeals of the District of Columbia from the judgment
above-mentioned on the grounds set forth below.

EDWARD COUPE

HENRY LYNCH

Appellant.

DENNY HUGHES

Attorney for Appellant.

Date 6-19-39.

Grounds of Appeal

1. Misconduct of Court.
2. Illegal search & arrest.
3. Joining of felony & misdemeanor counts in same indictment & correction & sentence on both on same evidence.
4. Giving of Allen charge

Service accepted

G McNEILL
Asst U S Atty

A true copy

(Seal) Test: CHARLES E. STEWART,
Clerk
By B ELOISE NAPHEN

2 Endorsed: United States Court of Appeals for
the District of Columbia Filed Jun 20 1939 Joseph
W. Stewart, Clerk

Docket Entries, Criminal, on Appeal

District Court of the United States for the District of
Columbia

Clerk's statement of docket entries to accompany duplicate notice of appeal to the Court of Appeals.

Criminal No. 63146

UNITED STATES OF AMERICA

vs.

1. EDWARD COUPE,
2. HENRY LYNCH.

Date

1938

Dec. 7 Presentment and indictment filed
" 9 each: Arraigned, Plea Not Guilty, Recognizance
\$1,500.00 taken with William P. Ryan, surety
" 15 No. 1, Motion to suppress filed.

1939

Jan 20 No. 1, Motion to suppress argued and overruled
Apr 27 each: Jurors from Criminal Division One and

Two sworn on voir dire. Jury sworn; jury given a sealed verdict and ordered to return same tomorrow at Ten A M,

“ 28 each: Jury returns into Court with sealed verdict, Verdict Guilty as indicted. defendants to remain on bond pending sentence

May 1 each: Motion for a new trial filed.

“ 19 each: Motion for a new trial, argued and over-ruled, Exception

June 2 each: Case referred to the Probation Officer of the Court

“ 19 No. 1. Sentenced to Penitentiary for period of Six (6) months to One (1) year and One (1) day on First count and Six (6) months on Second count, counts to run concurrently.

Date June 20, 1939 A. D.

(Seal) Attest: CHARLES E. STEWART,
Clerk.

By B ELOISE NAPHEN
Assistant Clerk.

Note.—This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal, which is to be prepared and certified as provided in Rules 7, 8, and 9, of Supreme Court U. S.

3 Docket Entries, Criminal, on Appeal

District Court of the United States for the District of
Columbia

Clerk's statement of docket entries to accompany duplicate notice of appeal to the Court of Appeals.

Criminal No. 63146

UNITED STATES OF AMERICA

VS.

1. EDWARD COUPE,

2. HENRY LYNCH.

Date

1939

Presentment and indictment filed

June 19 No. 2. Sentenced to Jail for period of Three (3) months to Six (6) months on First count and Five (5) months on Second count, counts to run concurrently.

each: Notice of appeal filed.

each: Twelve Dollars (\$12.00) costs on appeal paid clerk of U. S. Court of appeals D. C. Five Dollars (\$5.00) clerks fee paid

each: Bond on appeal fixed by Court at \$2,000.00.

each: Recognizance \$2,000.00 on appeal taken with William P. Ryan surety.

Date June 20, A. D., 1939

Attest: CHARLES E. STEWART,

(Seal)

Clerk.

By B ELOISE NAPHEN

Assistant Clerk.

Note.—This statement from this docket entries is intended suitably to identify the case and not as a substitute for the record on appeal, which is to be prepared and certified as provided in Rules 7, 8, and 9, of Supreme Court U. S.

4 Endorsed: United States Court of Appeals for the District of Columbia Filed Nov 20 1939 Joseph W. Stewart, Clerk

District Court of the United States for the District of Columbia

Criminal No. 63146

UNITED STATES

VS.

EDWARD COUPE,
HENRY LYNCH

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

5

Indictment

Filed in Open Court December 7, 1938

District Court of the United States for the District of
Columbia

Holding a Criminal Term

October Term, A. D. 1938.

DISTRICT OF COLUMBIA, ss:

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one Edward Coupe and one Henry Lynch, on, to wit, the seventh day of November, 1938, and at the District of Columbia aforesaid, unlawfully, feloniously and knowingly were concerned as owners, agents and clerks in managing, carrying on, promoting and advertising a certain lottery, commonly known as and called the numbers game; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Second Count:

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That one Edward Coupe and one Henry Lynch, on, to wit, the seventh day of November, 1938, and at the District of Columbia aforesaid, did have in their possession, unlawfully and knowingly, certain tickets, certificates, bills, slips, tokens, papers and writings, used and to be used, and adapted, devised and designed for the purpose of playing, carrying on and conducting a certain lottery, commonly known as and called the numbers game; against the form

of the statute in such case made and provided, and
6 against the peace and government of the said United
States.

HARRY L. UNDERWOOD
*Assistant Attorney of the
United States in and for the
District of Columbia.*

(Endorsed)

Criminal No. 63146. United States vs. Edward Coupe,
Henry Lynch. Violation Sections 863 and 863-a of D. C.
Code as Amended. A true bill: Allen G. Evans Foreman.

Memorandum

December 9, 1938

Each: Arraigned, plea not guilty.

Motion of Edward Coupe to Suppress

Filed December 15, 1938

*

*

*

Comes now the defendant, Edward Coupe, by his attorney, Denny Hughes, and moves this Honorable Court suppress any evidence seized from him on, to wit, the seventh day of November, 1938 for the following reasons:

1. That the search of the automobile of the defendant was illegal.
2. That the subsequent arrest of the defendant was illegal.
3. And for other good and sufficient reasons.

DENNY HUGHES
Attorney for Defendants

7 *Affidavit in Support of Motion to Suppress*

*

*

*

Edward Coupe, defendant in the above-entitled cause, being first duly sworn deposes and says:

That on the seventh day of November, 1938 affiant was parked on Thirtieth Street, N. W. between K and M Streets at or about one P. M. That for a period of about ten minutes the affiant was standing besides his car on the outside talking to the co-defendant, Henry Lynch. That while standing there Officer McEwen walked up and placed him under arrest and placed him into a car belonging to the arresting officers; whereupon, the officers demanded of the affiant the keys to his car and the keys to the compartments therein. Upon opening the compartments of the car the officers found a quantity of number slips that were in the custody of the affiant. These slips were seized by the officers contrary to my constitutional protection and are being used against me in the above-entitled cause.

EDWARD COUPE

Subscribed and sworn to before me this tenth day of December, 1938.

ROSELYN B. SUSSAN

(Notarial Seal)

*Notary Public, District of
Columbia*

8

Memoranda

January 20, 1939

Motion to suppress argued and overruled.

April 28, 1939

Each: Verdict guilty as indicted.

Motion for a New Trial

Filed May 1, 1939

* * *

Comes now the defendants, Edward Coupe and Henry Lynch, by their attorney, Denny Hughes, and moves that this Honorable Court grant the defendants a new Trial in the above-entitled cause on the grounds hereinafter set forth:—

6 of the statute in such case made and provided, and
against the peace and government of the said United
States.

HARRY L. UNDERWOOD

*Assistant Attorney of the
United States in and for the
District of Columbia.*

(Endorsed)

Criminal No. 63146. United States vs. Edward Coupe,
Henry Lynch. Violation Sections 863 and 863-a of D. C.
Code as Amended. A true bill: Allen G. Evans Foreman.

Memorandum

December 9, 1938

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3. And for other good and sufficient reasons.

DENNY HUGHES

Attorney for Defendants

7 *Affidavit in Support of Motion to Suppress*

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EDWARD COUPE

Subscribed and sworn to before me this tenth day of December, 1938.

ROSELYN B. SUSSAN

(Notarial Seal)

*Notary Public, District of
Columbia*

8

Memoranda

January 20, 1939

Motion to suppress argued and overruled.

April 28, 1939

Each: Verdict guilty as indicted.

Motion for a New Trial

Filed May 1, 1939

* * *

Comes now the defendants, Edward Coupe and Henry Lynch, by their attorney, Denny Hughes, and moves that this Honorable Court grant the defendants a new Trial in the above-entitled cause on the grounds hereinafter set forth:—

1. The verdict was contrary to the evidence.
2. The verdict was contrary to the weight of the evidence.
3. Court erred in refusing to grant defense counsel's Motion for a Directed Verdict on the first count.
4. Court erred in refusing to grant a Directed Verdict after he had accused defense counsel of leading a witness and telling another witness what to say when no objection had been made by the Assistant District Attorney representing the government.
5. Court erred in giving the Allen instruction to the jury after the jury had been out but a short while.
6. And for other good and sufficient reasons to be brought to the attention of the Court at the hearing on this motion.

DENNY HUGHES

Attorney for defendants

9

Memorandum

May 19, 1939

Each: Motion for a new trial argued and overruled; exception.

District Court of the United States for the District of
Columbia

Monday, June 19', A. D., 1939

The Court resumes its session pursuant to adjournment:
Mr. Justice Adkins, presiding.

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Come as well the Attorney of the United States, as the defendants in proper person, each according to his recognition, and by their attorney, Denny Hughes, Esquire: whereupon it is demanded of each defendant what further he has to say why the sentence of the law should not be pronounced against him, and each says nothing except as he has already said; and thereupon it is considered by the Court that for his said offense the said defendant Edward Coupe be taken by the Superintendent of the Washington Asylum and Jail, to the Asylum and Jail, thence to the Penitentiary, as designated by the Attorney General of the

United States, there to be imprisoned for the period of Six (6) months to One (1) year and One (1) day on count one of the indictment, and for the period of Six (6) months on count two of the indictment, said sentences by the counts of the indictment to run concurrently; whereupon it is considered by the Court that for his said offense the said defendant Henry Lynch be imprisoned in the Asylum and Jail aforesaid for the period of Three (3) months to Six

10 (6) months on count one of the indictment, and for the period of Five (5) months on count two of the indictment, said sentences by the Counts of the Indictment to run concurrently; and thereupon each defendant by his attorney files his notice of appeal in this case and deposits with the Clerk of this Court the sum of Twelve Dollars to cover appellate costs, which said sum together with a copy of said notice of appeal and a copy of the docket entries are forwarded this day to the Clerk of the United States Court of Appeals for the District of Columbia; and thereupon the Court fixes the amount of recognizance on appeal in this case at Two Thousand Dollars (\$2,000.00), whereupon each defendant enters into a recognizance in the sum of Two Thousand Dollars (\$2,000.00), with William P. Ryan as surety to forthwith surrender himself to the custody of the Marshal of the District to be dealt with and proceeded against according to law in case the judgment appealed from shall be affirmed, or the appeal for any cause dismissed, or the judgment be reversed and a new trial ordered, or if he, the said defendant, depart the Court without leave.

Assignment of Errors

Filed September 9, 1939

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*

*

Comes now the defendants by their counsel, Denny Hughes and Fred W. McConnell, and assign as errors committed by the Court the following:

1. That the motion to suppress the evidence seized from the possession of the defendants, i. e., number slips and numbers books, in that such was illegal and in violation of their constitutional rights as citizens, should have been granted.

11 2. That the Trial Justice erred in refusing to grant a continuance, if but for one day, due to the unavailability of a stenographer at the time of trial to report the case.

3. That the Court erred in excluding from admission into evidence, two photographs; offered for the edification of the jury, of a car of the same make, model and type—in a word a duplicate of—the automobile of the defendant Coupe, from which the number slips and numbers books were seized; these prints having been identified by an expert upon automobiles of the type in question and a person familiar with the scene, and one who would have testified, had he been permitted, that they accurately represented the situs of the seizure.

4. Misconduct of the Trial Justice:

The action of the Court, over objection and exception, in stopping counsel before he had completed a question which had been directed to a witness, taking the position that it was leading, when in its incompleteness it was impossible to anticipate its importations.

On an occasion in the cross-examination of a defense witness, when counsel had contended the witness had testified differently with respect to the particular matter on direct examination, the Court exclaiming, “don’t you (meaning counsel for the defendants) tell that witness what to say!”

And, while examining a subsequent witness for the defense, counsel for the defendants, in the interest of saving time, sought to direct the person testifying to a certain day: the date was already in evidence, the Government’s attorney having been afforded this right during his examinations, and was admonished by the Court not to direct

12 the witness’ attention to the date in question.

5. That the Court, pursuant to the defendants’ motion for a mistrial, should have withdrawn a juror and continued the case.

6. That the motions for directed verdicts of not guilty should have been granted:

(a) That due to the illegality of the search, the defendants as to both counts of the indictment were not shown to have been possessed of number slips and numbers books; that if the photographs had been admitted into evidence, this position would have been clearly shown.

(b) That the acts charged in each count of the indictment to have been committed by the defendants were, per se, identical; and that a judgment sustained as to both counts would operate as of necessity of twice convicting each defendant for the same act.

7. That the Court erred in its instructions to the jury with respect to the character testimony adduced in support of the defense of the defendant Coupe, when it said that "even if it be of low grade, you may consider it;" also by not permitting the witnesses to testify along with his reputation within the community for peace and good order, his reputation for truth and veracity.

8. That the Court erred in interrupting the jury after it had deliberated but for twenty minutes, and instructing them in the so-called "Allen Charge," being the authority laid down in *Allen vs United States*, 164 U. S. 493.

9. That the Court erred in imposing sentence as to both counts of the indictment with respect to each defendant for reasons delineated in Assignment 6b.

13 10. That the defendants motion for a new trial should have been granted, for the reasons therein exposed, such forming a part of this record.

11. And for other errors apparent upon the record.

DENNY HUGHES,

Attorney for Defendants

FRED W. McCONNELL

Attorney for Defendants.

District Court of the United States for the District of
Columbia

Wednesday, November 8", A. D., 1939

The Court resumes its session pursuant to adjournment:
Mr. Justice Gordon, presiding.

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*

Now comes here each defendant by his attorneys Denny Hughes, Esquire, and Fred W. McConnell, Esquire; and prays the Court to sign, and make a part of the record his Bill of Exceptions taken during the trial of the case and submitted to the Court on the 8th day of November,

A. D., 1939, which is accordingly done, and thereupon the Bill of Exceptions is filed.

ADKINS, J.

Designation of Record

Filed September 9, 1939

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*

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Comes now the defendants, by their counsel, and designate their record on appeal to be the following:

1. The indictment.
- 14 2. The motion to suppress.
3. Memo—Plea of Not Guilty.
4. Bill of exceptions.
5. Memo—Verdict of the jury.
6. Motion for new trial.
7. Judgment of Court on verdict.
8. Memo—Notice of appeal.
9. Assignment of errors.
10. This designation.

DENNY HUGHES,

Attorney for Defendants; and.

FRED W. McCONNELL

Attorney for Defendants.

Service of copy of the above Designation acknowledged this 5th day of September, 1939.

WILLIAM S. TARVER

Assistant U. S. Attorney.

Designation of Record approved this 7th day of September, 1939

JESSE C ADKINS

Justice

15 District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 10, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause entitled United States vs. Edward Coupe and Henry Lynch, Criminal No. 63146, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribed my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of November, 1939.

(Seal) CHARLES E STEWART,
Clerk,

By CHAS B COFLIN,
Assistant Clerk.

16 Endorsed: United States Court of Appeals for
the District of Columbia Filed Nov 20 1939 Joseph
W. Stewart, Clerk

Filed November 8, 1939

In the District Court of the United States
for the District of Columbia

Criminal No. 63,146

UNITED STATES

vs.

EDWARD COUPE and HENRY LYNCH, *Defendants.*

Bill of Exceptions

Be it remembered that a motion to suppress the evidence seized from the possession of the defendants on the grounds that such seizure was in violation of their constitutional rights was filed December 15, 1938, and the evidence pursuant to said motion was heard by Mr. Justice Laws, sitting in Criminal Court No. 3, District Court of the United

States for the District of Columbia, on January 20, 1939, at which time the motion was denied. Exception was taken on behalf of each defendant to the denial of the motion. The testimony of the arresting officers **George C. Deyoe** and **William McEwen** was presented by the United States at the hearing of the motion. The two officers testified that the day before the defendants were arrested, information had been received from a source the officers had heretofore found to be reliable that a 1937 Lincoln Zephyr automobile, bearing District of Columbia tags 117-297, owned and operated by the defendant Coupe was engaged in the numbers racket, picking up number slips at various locations in the Georgetown section of the District of Columbia, one of these locations being in the 1000 block of 30th Street, Northwest, where Coupe, in the above described car, would receive a large quantity of number slips each week-day at about 12:45 P. M. to 1 P. M. from a colored man who would place the numbers slips in Coupe's car. They further testified that, acting upon such information, they went to 30th and M Streets, Northwest, in the District of Columbia, where they observed the defendant Coupe driving south on 30th Street. They followed his automobile, falling in directly behind a car which was between their automobile and the defendant Coupe's. The defendant's car

17 stopped in front of 1062 30th Street, and as they neared the rear of the intervening car, the defendant Lynch approached carrying a brown paper bag. He engaged Coupe in conversation for a few seconds, obtained some small object from him, later found to be a key to the rear compartment of the automobile, went to the rear of the car, unlocked and opened the rear compartment and placed the brown paper bag therein.

At this point both the officers were seated in the front seat of their automobile, directly behind the intervening automobile, a short distance from the rear of Coupe's car. Then the intervening automobile pulled around Coupe's car, at which time the rear compartment door was raised. The officers testified that, when the rear compartment was opened, they had a clear view of the compartment and saw therein a large paper carton, which had been torn open, and inside of which was what they took to be a large number of paper pads such as their experience had shown them

were used in the writing of numbers. The carton was not introduced in evidence on the hearing of the motion to suppress.

Officer McEwen testified that after the defendant Coupe's car had been taken to Police Headquarters, and in the absence of the defendants, he looked through a "crack beneath the closed door of the glove compartment on the dashboard" and that he saw therein what he took to be number slips. That subsequently both dashboard and rear compartment doors were unlocked, number slips being found in the former as well as a paper bag containing slips in the latter, together with a carton containing new, unused number slips, in book form.

It was a part of the testimony of Officer McEwen that the defendants were not charged until after the number slips and numbers books had been found, at Police Headquarters.

Proper objections were made at the hearing of the motion to the offer in evidence at the trial of all or any of the number slips and numbers books on the grounds
 18 that it was impossible for the officers to have seen, from their seated position in their car at the time, the articles subsequently seized; upon the evidence the intervening car, together with the spare tire of the defendant Coupe's automobile—which was in an upright position at this time—manifestly serving as an obstruction to such view.

Be it further remembered that the case was called for trial on March 23rd when it was continued to April 6th because it could not be reached on the calendar. On April 6th it was continued until April 18th for the same reason. On April 18th the attorney for the defendants stated to the Court that he desired a continuance because he was unable to procure the services of a stenographer to report the testimony, no court reporter being available on that day. Whereupon Mr. Justice Atkins continued the case to April 27th. On April 27th the attorney for the defendants expressed his desire to the Court that a stenographer be employed, at his expense, to report the case: he stated that he had tried assiduously to procure such an officer, but without success; stating further that it was important in that serious questions of law were involved, and that if

the jury returned a verdict against his clients, it was his intention to appeal. He suggested that the case be continued if but for one day so that such services could be employed. The Court refused to permit the continuance. Exception was taken to this ruling.

Whereupon, the case came on for trial on April 27th before Mr. Justice Atkins and a jury in the District Court of the United States for the District of Columbia. To maintain the issues upon its part joined the United States introduced the following evidence and the following proceedings were had:

So much of the testimony which had been presented at the hearing of the motion to suppress the evidence, as was not hearsay, was adduced in support of the Government's case at the trial except that upon cross-examination Officer

19 McEwen was asked whether he had not testified at the hearing of the motion that the side of the carton of blank numbers books, which he observed in the rear compartment of Coupe's car, was torn. He answered that he did not know whether he had so testified, but that if he had so testified, he had incorrectly described the situation, since he meant to convey only that the top flaps of the carton were torn and that thusly the contents were disclosed to him. Asked further, on cross-examination, whether he would deny that he had testified at the hearing of the motion to suppress the evidence that the side of the carton was torn, Officer McEwen replied that he did not deny that he had said that, but that he did not remember saying it.

When objection was made to the admission in evidence of the carton of blank numbers books and several thousand number slips which were found in Coupe's car, the jury was excluded and the Court heard evidence from the two police officers concerning the nature of the information upon which they had acted. Both officers with the one above exception, testified substantially as they had at the hearing of the motion to suppress the evidence. Whereupon, the jury was recalled and the evidence was admitted over the objection and exception of counsel for the defendants.

At the close of the Government's case, a motion for a directed verdict of not guilty was made on behalf of each defendant with respect to both counts of the indictment on

the grounds that the search of the defendant Coupe's automobile was illegal because it was impossible for the officers to have observed the number slips and numbers books from their seated position in their car, therefore, precluding the Government from making out a *prima facie* case. The motion was overruled, and an exception noted. Counsel for the defendants then moved for a directed verdict of not guilty upon one of the counts of the indictment on behalf of each defendant on the ground that the acts charged in each count were identical, and that a judgment sustained

as to both would operate as of necessity of twice convicting each defendant for the same act. Likewise, this motion was overruled, with exception noted.

To support their defense, the defendants offered, for the edification of the jury, two photographic prints, depicting from different angles two views of a Lincoln Zephyr car. Counsel for the defendants told the Court that the car depicted in the photographic representations was the same make, model and type—in a word a duplicate of—the automobile of the defendant Coupe, from which the numbers books and number slips were removed; too, it was his position that the photographs represented the scene both as to things portrayed and their topography, except the photographs showed a car parked immediately abreast the curb-line, when at the time of the apprehension of the defendants Coupe's car was double-parked.

No testimony was offered that the photographs depicted the car that was driven by Coupe. However, a witness for the defendants, a salesman of Lincoln Zephyr cars and qualified as a expert upon automobiles of this type, testified that the model and type of Coupe's car was well known to him, and that the car shown in the photographs was the same model and type as Coupe's automobile. He testified that when the rear compartment door of a car of the model and type depicted in the photographs was raised, the spare tire swung automatically into an upright position in precisely the same way as that indicated in one of the photographs. Objection was made by the Government on the grounds that the photographs did not depict the automobile of the defendant, that there was no evidence, at that time, except the statement of counsel for defendants, that there was a spare tire and wheel in the rear compartment

of Coupe's automobile. (Coupe, and another witness, later testified that there was a spare tire and wheel as shown in the photographs in the rear compartment of his car at the time of the arrest of the defendants.) The Government further objected, contending that a proper foundation had not been laid for admission in evidence of the two
 21 photographs by any testimony of a person who made the photographs. The objection was sustained, with exception noted. At this time defense counsel told the Court that the purpose of the offer was to edify the jury photographically as to the mechanism of the instrumentality involved in the seizure, and the place at which such seizure was effected; and in so doing delineate the impossibility of Officers Deyoe and McEwen's ability of discerning objects of the nature to which they testified—through the open rear compartment door of the automobile of the defendant Coupe, from their seated position in their car—which, with the spare tire and wheel manifestly served as an obstruction to such view: in a word, as a mode of attack upon their credibility.

During the examination of one of his witnesses, counsel for the defendants began to question a witness, but before he could complete it was stopped by the Court, which said it was leading. Counsel for the defendants had said that he had not completed the question, and that the Court could not anticipate its import until its completion. Objection was made to the denial by the Court of permission to complete the question, and an exception noted.

In the course of the Government's cross-examination of a defense witness, counsel for the United States asked the witness, reciting certain facts, whether he had not so testified on direct examination. Counsel for the defendants objected, stating that such was not the former testimony. At this point, the Court said to defense counsel: "Don't you tell that witness what to say." Defense counsel then objected to the general attitude of the Court, contending that it had demonstrated definite opinion and prejudice with respect to the matters and things under investigation; that it was manifest that the Court had formed a conviction that the defendants were guilty; and that it appeared most improbable that his clients would receive a fair and impartial trial in that Court. For these reasons, he moved

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While examining a subsequent witness concerning the date when the defendant Coupe's automobile had been at a certain place, counsel for the defendants sought to direct the witness' attention to a certain day: the date had previously been testified to by other witnesses, and the Government's attorney had been afforded this right during his examinations, and was admonished by the Court not to direct the witness' attention to that date. Counsel for the defendants thereupon stated that his question had been prompted by a desire to expedite the proceedings and that counsel for the United States had been afforded a similar courtesy during his examinations of witnesses. The Court persisted in its refusal, over the objection of counsel for the defendants, to permit counsel to mention the date. An exception was taken to this ruling.

The defendant **Coupe** testified in his own defense; Lynch did not.

Coupe produced six character witnesses—persons of unimpeached reputations—all testifying that they were familiar with his reputation for peace and good order within the community, all stating that it was very good. Counsel for Coupe inquired of these six witnesses, in conjunction with their testimony as to his reputation within the community for peace and good order, his reputation for truth and veracity; but this was objected to by the attorney for the Government. The Court sustained the objection. Objection was then made to this ruling by counsel for the defendants, with exception noted.

At the close of the defense, counsel for the defendants renewed his motion for a directed verdict of not guilty on behalf of both defendants with respect to both counts of the indictment on the grounds that the search of Coupe's automobile was illegal because it was impossible for the officers to have observed the number slips and numbers books from their seated positions in their car, there-
 23 fore, precluding the Government from making out a *prima facie* case; and that the acts charged in each count of the indictment were identical, and that a judgment sustained as to both would operate as of necessity of twice

convicting each defendant for the same act. The motion was overruled, with an exception noted.

At the beginning of his charge to the jury, the Court stated that he had the highest regard for the ability and character of counsel for the defense, and that he considered that he had conducted the case in a proper and ethical manner. The trial justice stated that it was the Court's function to decide all questions of law, but that it was their exclusive function to decide all questions of fact; that if anything he had said or done during the course of the trial had led the jury to believe he had formed an opinion as to the facts of the case or as to the guilt or innocence of the accused, they should disregard such belief; that they were the sole judges of the facts and that they should form their conclusions solely from the evidence. That the circumstances of a case may be such that an established reputation for good character would alone create a reasonable doubt although without it the other evidence in the case might be convincing; that the jury had heard the testimony on this subject on behalf of the defendant and that it was for them to say whether it was such as in itself would create a reasonable doubt in their minds as to the defendant's guilt; that even if it was not of so high a grade, still it was important evidence on behalf of the defendant—that is, evidence of good character is persuasive, but not compulsory.

Counsel for the United States and for the defendants then agreed upon a sealed verdict. The jury retired to begin its deliberations at 4:30 P. M. When they had deliberated about an hour, the Court recalled them and instructed as to the mechanics of returning a sealed verdict, and the clerk gave them the form of such verdict. The

24 Court also delivered to the jury at this time the so-called "Allen charge" as contained in the case of *Allen vs. United States*, 164 U. S. 493. The jury had not requested any further instructions, and the trial counsel for the defendants was not present in the courtroom at the time, but was represented by an office associate who was told that the Court proposed to give the Allen charge and made no objection thereto.

The jury found each defendant guilty as to both counts of the indictment, pursuant to which the Court sentenced each defendant upon both counts.

Be it further remembered that the foregoing constitutes all the evidence material to the objections and exceptions herein reserved on behalf of the defendants; and that they pray that this, their bill of exceptions, be and the same is hereby signed this 8th day of November, 1939.

JESSE C. ADKINS

Justice

The bill is satisfactory:

WILLIAM S. TARVER,

Assistant United States Attorney

DENNY HUGHES,

Attorney for Defendants

FRED W. McCONNELL,

Attorney for Defendants

Endorsed on Cover: No. 7446 Coupe et al., Appellants, vs. United States of America. United States Court of Appeals for the District of Columbia Filed Jun 20 1939 Joseph W. Stewart, Clerk

OFFICE COPY

Addition to Record per Stipulation of Counsel

**United States Court of Appeals for the
District of Columbia**

JANUARY TERM, 1940.

No. 7446

SPECIAL CALENDAR.

**EDWARD COUPE AND HENRY LYNCH,
APPELLANTS,**

vs.

UNITED STATES OF AMERICA.

FILED JANUARY 8, 1940

1 United States Court of Appeals for the District of
Columbia Filed Jan 8-1940 Joseph W. Stewart,
Clerk

In the United States Court of Appeals
for the District of Columbia

No. 7446

EDWARD COUPE AND HENRY LYNCH, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

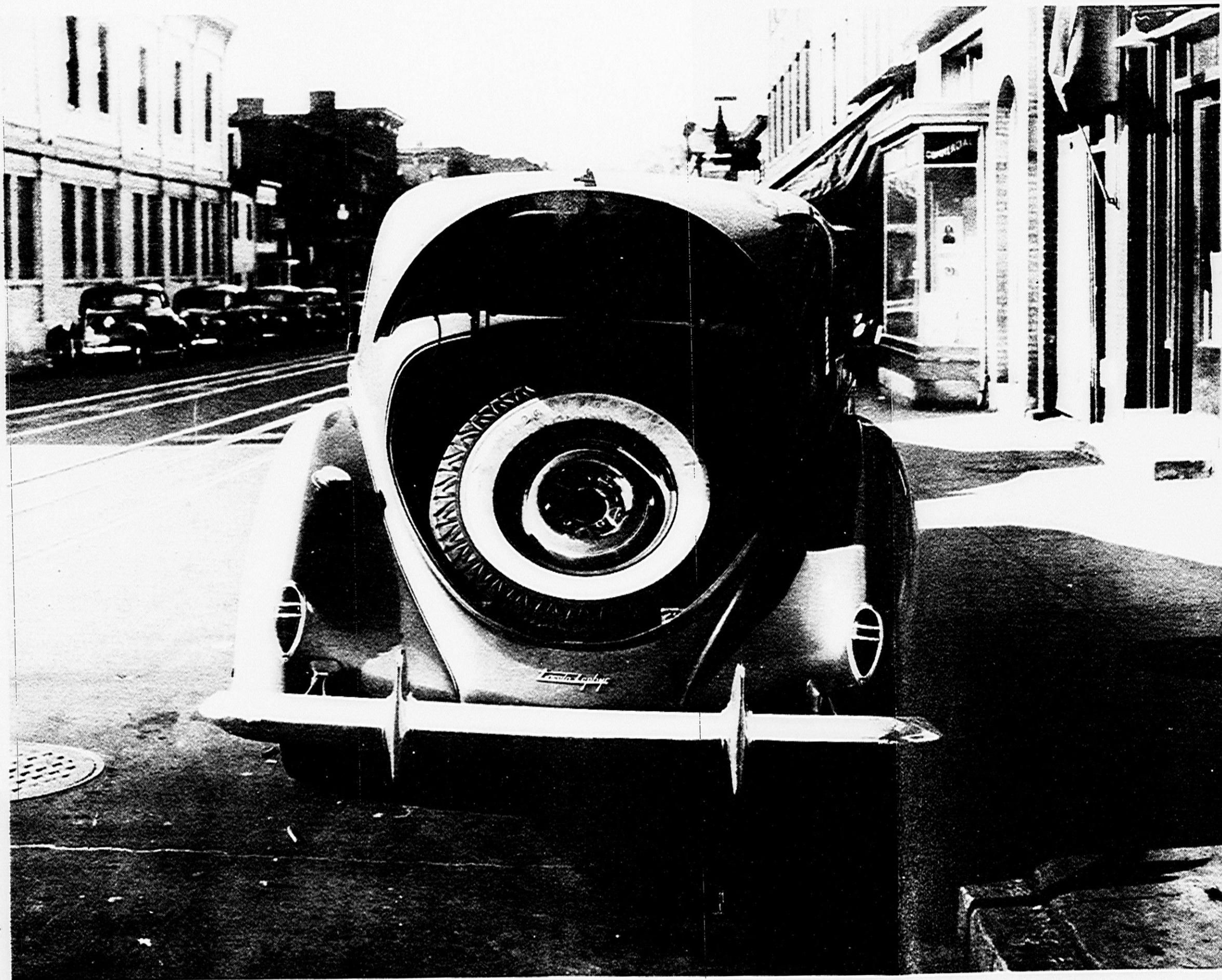
*Stipulation of Incorporation of Two (2) Photographic
Positives in Transcript of Record in Case No. 7446:
The Above Entitled Cause.*

It is hereby stipulated and agreed between William S. Tarver, Esquire, for the Government of the United States, and Denny Hughes and Fred W. McConnell, for the appellants, that the two (2) photographic positives offered for admission into evidence in support of the defenses of the appellants Edward Coupe and Henry Lynch during their trial in the District Court of the United States for the District of Columbia, holding a Special Term as a Criminal Court, thereat excluded from evidence, and bearing on each reverse side of said photographs the initials "W.S.T.", and immediately below "D.H.", be, and the same are herewith made a part of the transcript of the record in the above entitled cause.

For the United States of America, Appellee:

WILLIAM S. TARVER (F.W.McC.)
Assistant United States Attorney.

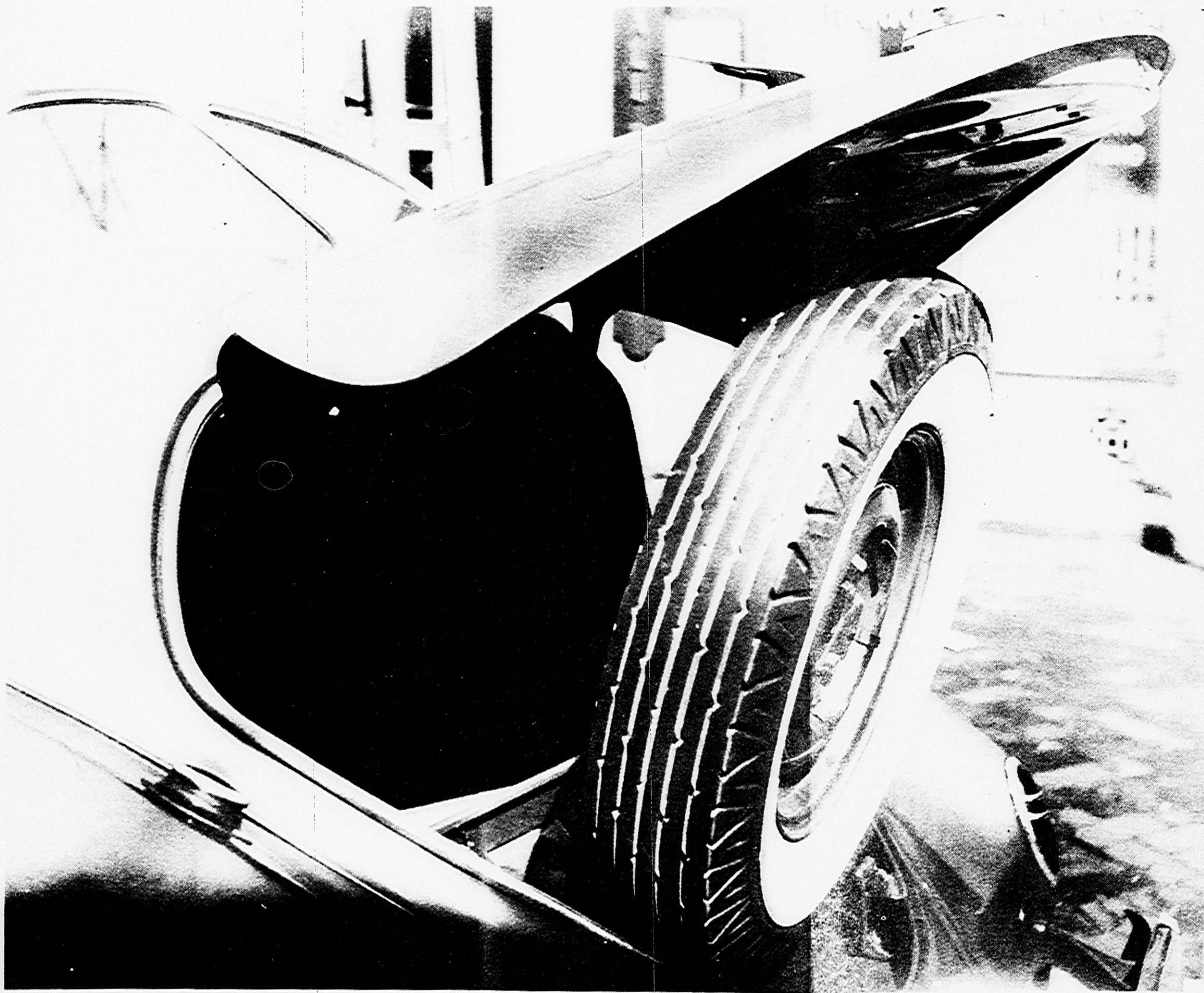
DENNY HUGHES, and (F.W.McC.)
FRED W. McCONNELL,
Attorneys for the Appellants.



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FILED DEC 26 1939

Joseph W. Stewart
Clerk

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

October Term, 1939.

No. 7446.

EDWARD COUPE and HENRY LYNCH, *Appellants.*

v.

UNITED STATES OF AMERICA, *Appellee.*

**BRIEF ON BEHALF OF EDWARD COUPE AND
HENRY LYNCH.**

DENNY HUGHES,
FRED W. McCONNELL,
Attorneys for Appellants.

DAVID A. PINE,
United States Attorney;

WILLIAM S. TARVER,
Assistant United States Attorney.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

October Term, 1939.

No. 7446.

EDWARD COUPE and HENRY LYNCH, *Appellants*.

v.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court of the United States for the District Court of Columbia, holding a Special Term as a Criminal Court, to entertain these prosecutions, which were instituted by the United States Attorney in and for the District of Columbia, pursuant to an indictment returned by the Grand Jurors of the United States of America in and for the

District of Columbia, October Term, A. D. 1938, is conferred by virtue of Section 81, Title 18 of the D. C. Code (1929), at Page 163. This Court has jurisdiction on appeal from sentences of said Court below, such authority contained in Section 355 of Title 6 of the D. C. Code (1929), at Page 68.

STATEMENT OF CASE.

The appellants were indicted jointly by the Grand Jurors of the United States of America in and for the District of Columbia, October Term, A. D. 1938, tried and together convicted in the District Court of the United States for the District of Columbia, Mr. Justice Adkins presiding, of violating Sections 863 as amended, and 863a, of the Code of Laws of the District of Columbia. (R. 5.) The indictment was in two counts: Section 863 as amended, or the felony count, being joined with Section 863a, the misdemeanor count. The former charging that they "... unlawfully, feloniously and knowingly were concerned as owners, agents and clerks in the managing, carrying on, promoting and advertising a certain lottery, commonly know and called the numbers game;" The latter charged that they "... did have in their possession, unlawfully and knowingly, certain tickets, certificates, bills, slips, tokens, papers and writings, used and to be used, and adapted, devised and designed for the purpose of playing, carrying on and conducting a certain lottery, commonly known and called the numbers game; . . ."

A motion to suppress the evidence taken from the possession of the appellants on the ground that the seizure was in violation of their respective constitutional rights as expressed in the Fourth and Fifth

Amendments, was propitiously filed, thence argued before Mr. Justice Laws, the same being overruled, with exceptions duly noted. (R. 7.)

During the hearing of the motion, the arresting officers, Deyoe and McEwen, testified that they had received certain information from a source they heretofore considered reliable: from whence such knowledge came they refused to divulge. That acting upon such information they were caused to go to Thirtieth and M Streets, Northwest, in the District of Columbia. That there they espied the appellant Coupe driving south on Thirtieth Street, crossing M. They followed; falling in directly behind an intervening car and the appellant Coupe's automobile. The appellant's car stopped in front of 1062 Thirtieth Street; and, as they neared the rear of the intervening car, the appellant Lynch approached carrying a brown paper bag, engaged Coupe in conversation for a few seconds, then went to the rear of the car, unlocked and lifted the deck-door and placed the bag in the rear compartment.

At this time both Officers Deyoe and McEwen were seated in the front seat of their car.

They testified that when the rear-compartment door was opened there was disclosed therein what appeared to be new numbers books in a paper carton, *the side of which was torn*, creating an aperture through which this intelligence was protracted. The carton was not introduced in evidence on the hearing of the motion to suppress the evidence seized, but was produced in support of the Government's case at the trial, *at which time it was revealed to be untorn*.

Officer McEwen testified that after the defendant Coupe's automobile had been taken to Police Headquarters, and in the absence of the defendants, he

looked through the closed glove compartment on the dashboard and saw therein number slips: saw them, he said, "through a crack in the door." That subsequently both dashboard and rear-compartment doors were unlocked, number slips being found in the former as well as a paper bag containing slips in the latter, together with a carton containing new, unused number slips, in book form.

It was a part of the testimony of Officer McEwen that the appellants were not charged until after the number slips and numbers books had been found, at Police Headquarters.

Proper objections were made at the hearing of the motion to the offer in evidence at the trial of all or any of the number slips and numbers books on the grounds that it was impossible for the officers to have seen, from their seated position in their car at the time, the articles subsequently seized; upon the evidence the intervening car, together with the spare tire of the defendant Coupe's automobile—which was in an upright position at this time—manifestly serving as an obstruction to such view.

This case was called for trial on March 23rd, when it was continued to April 6th because it could not be reached on the calendar. On April 6th it was continued until April 18th for the same reason. On April 18th the attorney for the defendants stated to the Court that he desired a continuance because he was unable to procure the services of a stenographer to report the testimony, no court reporter being available on that day. Whereupon Mr. Justice Adkins continued the case to April 27th. On April 27th the attorney for the defendants expressed his desire to the Court that a stenographer be employed, at his expense, to report the case:

he stated that he had tried assiduously to procure such an officer, but without success; stating further that it was important in that serious questions of law were involved, and that if the jury returned a verdict against his clients, it was his intention to appeal to this Court. Too, the Assistant United States Attorney in charge of the prosecution also had sought the services of a stenographer, but that none was available at the time. It was requested by counsel that the case be continued if but for one day so that such services could be employed. The Court refused to permit the continuance. Exception was taken to this ruling. (R. 16.)

Whereupon, the case came on for trial on April 27th before Mr. Justice Adkins and a jury in the District Court of the United States for the District of Columbia. To maintain the issues upon its part joined, the United States introduced the following evidence and the following proceedings were had:

So much of the testimony which had been presented at the hearing of the motion to suppress the evidence, as was not hearsay, was adduced in support of the Government's case at the trial except that upon cross-examination Officer McEwen was asked whether he had not testified at the hearing of the motion that the side of the carton of blank numbers books, which he observed in the rear compartment of Coupe's car, was torn. He answered that he did not know whether he had so testified, but that if he had so testified, he had incorrectly described the situation, since he meant to convey that the top flaps of the carton were torn and that thusly the contents were disclosed to him. Asked further, on cross-examination, whether he would deny that he had testified at the hearing of the motion to suppress the evidence that the side of the carton was

torn, Officer McEwen replied that he did not deny that he had said that, but that he did not remember saying it.

When objection was made to the admission in evidence of the articles found in Coupe's car, the jury was excluded and the Court heard evidence from the two police officers concerning the nature of the information upon which they had acted. Both officers, with the one above exception, testified substantially as they had at the hearing of the motion to suppress the evidence. Whereupon, the jury was recalled and the evidence was admitted over the objection and exception of counsel for the defendants. (R. 16.)

At the close of the Government's case, a motion for a directed verdict of not guilty was made on behalf of each defendant with respect to both counts of the indictment on the grounds that the search of the defendant Coupe's automobile was illegal because it was impossible for the officers to have observed the number slips and numbers books from their seated position in their car, therefore, precluding the Government from making out a *prima facie* case. (R. 16.) The motion was overruled, with exceptions noted. (R. 17.) Counsel for the defendants then moved for a directed verdict of not guilty upon one of the counts of the indictment on behalf of each defendant on the ground that the offenses charged in each count were identical, and that a judgment sustained as to both would operate as of necessity of twice convicting each defendant for the same crime. Likewise, this motion was overruled, with exceptions noted. (R. 17.)

To support their defense, the defendants offered, for the edification of the jury, two photographic prints, depicting from different angles two views of a Lincoln

Zephyr car. Counsel for the defendants told the Court that the car depicted in the photographic representations was the same make, model and type—in a word a duplicate of—the automobile of the defendant Coupe, from which the number slips and numbers books were removed; too, it was his position that the photographs represented the scene both as to the things portrayed and their topography, except the photographs showed a car parked immediately abreast the curb-line, when at the time of the apprehension of the defendants Coupe's car was double-parked.

No testimony was offered that the photographs depicted the car that was driven by Coupe. However, a witness for the defendants, a salesman of Lincoln Zephyr cars and qualified as an expert upon automobiles of this type, testified that the model and type of Coupe's car was well known to him, and that the car shown in the photographs was the same model and type as Coupe's automobile. He testified that when the rear-compartment door of a car of the model and type depicted in the photographs was raised, the spare tire swung automatically into an upright position in precisely the same way as that indicated in one of the photographs offered. (R. 17.) Objection was made by the Government on the grounds that the photographs did not depict the automobile of the defendant, that there was no evidence, at that time, except the statement of counsel for defendants, that there was a spare tire and wheel in the rear compartment of Coupe's automobile. (Coupe, and another witness, later testified that there was a spare tire and wheel in the rear compartment of the car at the time of the arrest of the defendants, as shown in the photographs (R. 18.)) The Government further objected, contending that the proper founda-

tion had not been laid for the admission in evidence of the two photographs by any testimony of a person who made the photographs. The objection was sustained, with exception noted. At this time defense counsel told the Court that the purpose of the offer was to edify the jury photographically as to the mechanism of the instrumentality involved in the seizure, and the place at which such seizure was effected; and in so doing delineate the impossibility of Officers Deyoe and McEwen's ability of discerning objects of the nature to which they testified—through the open rear-compartment door of the automobile of the defendant Coupe, from their seated position in their car—which, with the spare tire and wheel manifestly serving as an obstruction to such view: in a word, as a mode of attack upon their credibility.

During the examination of one of his witnesses, counsel for the defendants began to question a witness, but before he could complete the query was stopped by the Court, which said it was leading. Counsel for the defendants had said that he had not completed the question, and that the Court could not anticipate its import until its completion. Objection was made to the denial by the Court of permission to complete the question, and an exception noted. (R. 18.)

In the course of the Government's cross-examination of a defense witness, counsel for the United States asked the witness, reciting certain facts, whether he had not so testified on direct examination. Counsel for the defendants objected, stating that such was not the testimony. At this point, the Court said to defense counsel: "Don't you tell that witness what to say." Defense counsel then objected to the general attitude of the Court, contending that it had demonstrated definite opinion and prejudice with respect to the matters and

things under investigation; that it was manifest that the Court had formed a conviction that the defendants were guilty; and that it appeared most improbable that his clients would receive a fair and impartial trial in that Court. For these reasons, he moved that the Court withdraw a juror and continue the case. The motion was overruled, with exception noted. (R. 19.)

While examining a subsequent witness concerning the date when the defendant Coupe's automobile had been at a certain place, counsel for the defendants sought to direct the witness' attention to a certain day: the date had previously been testified to by other witnesses, and the Government's attorney had been afforded this right during his examinations, and was admonished by the Court not to direct the witness' attention to that date. Counsel for the defendants thereupon stated that his question had been prompted by a desire to expedite the proceedings and that counsel for the United States had been afforded a similar courtesy during his examinations of witnesses. The Court persisted in its refusal, over the objection of counsel for the defendants, to permit counsel to mention the date. An exception was taken to this ruling. (R. 19.)

The defendant Coupe testified in his own defense; Lynch did not.

Coupe produced six character witnesses—persons of unimpeached reputations—all testifying that they were familiar with his reputation for peace and good order within the community, all stating that it was very good. Counsel for Coupe inquired of these six witnesses, in conjunction with their testimony as to his reputation for peace and good order, his reputation for truth and veracity; but this was objected to by the attorney for the Government. The Court sustained the objection.

Objection was then made to this ruling by counsel for the defendants, with exception noted. (R. 19.)

At the close of the defense, counsel for the defendants renewed his motion for a directed verdict of not guilty on behalf of both defendants with respect to each count of the indictment on the grounds that the search of Coupe's automobile was illegal because it was impossible for the officers to have observed the number slips and numbers books from their seated positions in their car, therefore, precluding the Government from making out a *prima facie* case; and that the acts charged in each count of the indictment were identical; and that a judgment sustained as to both would operate as of necessity of twice convicting each defendant for the same act. The motion was overruled, with an exception noted. (R. 17.)

At the beginning of his charge to the jury, the Court stated that he had the highest regard for the ability and character of counsel for the defense, and that he considered that he had conducted the case in a proper and ethical manner. The Trial Justice stated that it was the Court's function to decide all questions of law, but that it was their exclusive function to decide all questions of fact; that if anything he had said or done during the course of the trial had led the jury to believe that he had formed an opinion as to the facts of the case or as to the guilt or innocence of the accused, they should disregard such belief; that they were the sole judges of the facts and that they should form their conclusions solely from the evidence. That the circumstances of a case may be such that an established reputation for good character would alone create a reasonable doubt although without it the other evidence in the case might be convincing; that the jury had heard the testimony on this subject on behalf of

the defendant and that it was for them to say whether it was such as *in itself* would create a reasonable doubt in their minds as to the defendant's guilt; that even if "it was not of so high a grade, still it was important evidence on behalf of the defendant—that is, evidence of good character is persuasive, but not compulsory." (R. 20.)

Counsel for the United States and for the defendants then agreed upon a sealed verdict. The jury retired to begin its deliberations at 4:30 P.M. When they had deliberated about an hour, the Court recalled them and instructed as to the mechanics of returning a sealed verdict, and the clerk gave them the form of such verdict. The Court also delivered to the jury at this time the so-called "Allen charge" as contained in the case of *Allen v. United States*, 164 U. S. 493, 41 L. Ed. 528; 17 Sup. Ct. 154. The jury had not requested any further instructions, and the trial counsel for the defendants was not present in the courtroom at the time, but was represented by an office associate who was told that the Court proposed to give the Allen charge and made no objection thereto.

The jury found each defendant guilty as to both counts of the indictment, pursuant to which the Court sentenced each defendant upon both counts. (R. 8.)

ASSIGNMENTS OF ERROR.

1. That the motion to suppress the evidence seized from the possession of the appellants should have been sustained.

2. That the Trial Justice erred in refusing to grant a continuance.

3. That the Court erred in excluding the admission of the photographs.

4. Misconduct of the Trial Justice. (Instances considered together.)

5. That the Court, pursuant to the appellants' motion for a mistrial, should have withdrawn a juror and continued the case.

6. That the motions for directed verdicts should have been sustained:

(a) That due to the illegality of the search, the appellants as to both counts of the indictment were not shown to have been possessed of number slips and numbers books; that if the photographs had been admitted into evidence, this position would have been clearly shown.

(b) That the acts charged in each count of the indictment to have been committed by the appellants were *per se*, identical; and that a judgment sustained as to both counts would operate as of necessity of twice convicting each defendant for the same act.

7. That the Court erred in its instructions to the jury with respect to the character testimony adduced in support of the defense of the appellant Coupe, when it said that "even if it be of low grade, you may consider it"; also by not permitting the witnesses to tes-

tify along with his reputation within the community for peace and good order, his reputation for truth and veracity.

8. That the Court erred in interrupting the jury after it had deliberated but for twenty minutes, and instructing them in the so-called "Allen charge," being the authority laid down in *Allen v. United States, supra*.

9. That the Court erred in imposing sentence as to both counts of the indictment with respect to each defendant for reasons delineated in Assignment 6b.

10. That the defendants' motion for a new trial should have been granted, for the reasons therein exposed, such forming a part of this record.

11. And for other errors apparent upon the record (R. 9, 10 and 11).

SUMMARY OF ARGUMENT.

I.

That the motion to suppress the evidence should have been granted, because the officers, on their own testimony, could not have constitutionally sized such evidence.

II.

That the Trial Justice erred in refusing to grant a continuance.

III.

That because of their established materiality as a mode of attack upon the credibility of the arresting officers, and consistent with sufficient and proper foundation, the Trial Justice's exclusion of the photographs from admission into evidence constituted reversible error: that their inclusion would have furnished a panorama of the seizure for the edification of the jury.

IV.

That the Trial Justice's general attitude throughout the trial indicated the prevalence of bias: that such reflected the infusion of judicial personality, thereby prejudicing the rights of the defendants.

V.

That the motion to withdraw a juror and declare a mistrial should have been granted for reasons delineated and authorities cited in Assignment 4, supra.

VI-A.

That the motions for directed verdicts of not guilty made on behalf of both defendants with respect to each count of the indictment should have been sustained; for had the photographs offered by the appellants been admitted into evidence, they would have clearly shown the impossibility of the officers observing, from their seated position in their car, number slips and numbers books in the rear compartment of the automobile of the appellant Coupe, and in consequence such seizure would have been illegal.

VI-B.

That under either Section 863, as amended, or 863a of the Code of Laws of the District of Columbia, proof of possession of number slips and numbers books is sufficient, and it was not incumbent upon the Government of the United States to establish proof of some additional fact; in consequence of which their conviction under these two distinct statutory provisions operated as of necessity of twice convicting each defendant for the same offense.

VII.

That the Trial Justice's instruction in regard to the jury's reception of the character testimony adduced in support of the defense of the appellant Coupe, by stating that it was "persuasive, but not compulsory," was misleading and confusing, thusly prejudicial, hence erroneous. *Egan v. United States*, supra.

VIII.

That the Trial Justice prejudiced the rights of the appellants when he interrupted the deliberations of the jury by recalling it and instructing them in the so-called "Allen charge," being the authority established in *Allen v. United States*, 164 U. S. 493, 41 L. Ed. 528; 17 Sup. Ct. 154.

IX.

That the defendants motion for a new trial should have been granted (R. 7, 8); and for the reasons therein presented, together with such fuller exposition and delineation as is manifested from the composition of this record.

X.

That the Court erred in imposing sentence upon each of the appellants with respect to both counts of the indictment for the reasons in toto, supra.

ARGUMENT.

I.

That the motion to suppress the evidence should have been granted, because the officers, on their own testimony, could not have constitutionally sized such evidence.

That the motion to suppress the evidence seized from the possession of the appellants should have been granted due to the impossibility of the officers observing, from their seated position in their car, number slips and numbers books in the rear compartment of the automobile of the defendant Coupe when, *inter alia*, the spare tire had served as an obstruction to such

view. That by overruling the motion, the Court's decision was contrary to the evidence adduced on behalf of the Government of the United States. (R. 13, 14, 15.)

II.

That the Trial Justice erred in refusing to grant a continuance.

On the day this case was set for trial and at the outset thereof, counsel for the appellants presented to the Court that he had tried propitiously to procure the services of a stenographer to report the case, the defendants to pay for such services. Counsel for the Government also expressed his desire of a reporter being present at the trial. It was insisted that this case was important both with respect to the Government and the appellants because Sections 863, as amended, and 863a of the Code of Laws of the District of Columbia had not yet been exhaustively interpreted by this Court. That more especially this indictment presented in regard to its sufficiency important questions of law. That justice would not be impeded, but, conversely, preserved, if the Trial Justice would consent to the delay if but for one day so that such an officer could be employed. Too, the Court was assured that in the event the jury were disposed to find the defendants guilty on one or both counts of the indictment, that they would be desirous of appealing a sentence passed pursuant thereto, to this Honorable Court. (R. 15.)

Two continuances were afforded the Government of the United States: from March 23rd to April 6th, thence to April 18th, because the case could not be reached on the calendar: only one was permitted the

appellants, and for the above reason: from April 18th to April 27th. (R. 15.)

It was expounded in *Home Insurance Company of Omaha v. Johnson*, 43 Neb. 71, thusly:

“Next it is insisted that there was no reporter by whom the evidence was taken at the trial, and that the presiding judge had refused to delay the trial until a reporter could be secured. It is easily conceivable that a case of hardship might arise by a refusal of the character indicated, and if such hardship appeared, the judgment could not stand. Provision has been made for the use of stenographers as reporters, and to the proper administration of justice their services are very valuable, and they should be required to be in attendance, just as is required by any other officer of the court when the trial is in progress. * * * ” See also, *Shoenfeldt v. State*, 30 Tex. Crim. App. 695.

While it is not contended that the Trial Justice's refusal to grant a continuance, if but for one day, was *per se* reversible error; yet under a composite interpretation of the cases cited above, in view of the hardship assumed by the appellants, manifested by the assignments of error in toto, together with the position of the Government's counsel in this respect, it is respectfully insisted by them that such refusal was arbitrary and unreasonable, in consequence, unjust.

III.

That because of their established materiality as a mode of attack upon the credibility of the arresting officers, and consistent with sufficient and proper foundation, the Trial Justice's exclusion of the photographs from admission into evidence constituted reversible error: that their inclusion would have furnished a panorama of the seizure for the edification of the jury.

In support of the appellants' position that it would have been a physical and topographical impossibility for the officers to have observed number slips and numbers books in the carton in the rear compartment of the automobile of the defendant Coupe, from their seated position in their car, which was parked in behind an intervening car and that of the appellant's, together with the spare tire serving as an obstruction to such view, there was offered for admission into evidence two photographs, identified by a person familiar with the locality and qualified as an expert upon automobiles of the kind displayed in the photographs and the kind and make and model of conveyance in which it was in evidence that from which the said articles were seized; in a word, pursuant to proper foundation, the photographs were identified by a competent witness as accurately depicting the scene as of the time of the seizure. (R. 17, 18.)

It was said in *Mow et al. v. People*, 31 Colo. 351:

"The fact that the photograph was not taken by a professional photographer does not render it inadmissible as evidence. If it is otherwise competent, it is only necessary to show that it is a correct likeness of the objects which it purports to represent, in order to warrant its admission into evidence, and this may be shown by the per-

son who made it *or by any competent witness.*"
(Italics Appellants'.)

Underhill on Criminal Evidence, 2nd Ed., Section 51, at Page 84, advances this synopsis as to the accuracy and relevancy of photographs:

"If the correctness of the photographs as a likeness is shown *prima facie*, either by the testimony of the person who made it or by other competent witnesses, to the effect that it faithfully represents the object portrayed, it should go to the jury subject to impeachment as to its accuracy." (Citing many authorities.)

The liberality with which the courts are at this day moved to interpret rules with respect to the admission of photographs, in their wisdom consciously attuned to the notoriously advanced state of the science, indeed, art of photography, as one of the most important mediums for the dissemination of intelligence within our society, has this to say even in the early case of *Stuart v. Bensse*, 10 Bosw. (N. Y. Super.) 436, that the question such as "Is the photograph correct?" though leading, may be put to a witness.

Inasmuch as the authorities fail to distinguish criminal from civil cases, as to class, with respect to the admission of photographs, the Court is herewith directed to its *Altemus v. Talmadge*, 58 Fed. (2nd) 874, 61 App. D. C. 148, where it states a broad and liberal yet sound and wise view with respect to this matter, by saying that:

"Evidence that the condition of a sidewalk at the place of the injury had not changed during the interval after accident until photographs were taken rendered photographs admissible, though several months after accident." See also *Gibson*

v. *Gernat*, 267 Fed. 305, 50 App. D. C. 3; *Shaffer v. United States*, 24 App. D. C. 417; *Robinson et al. v. United States*, 63 Fed. (2nd) 147, 61 App. D. C. 370; *Harris v. United States*, 71 Fed. (2nd) 532, 63 App. D. C. 232.

In the case of *Kansas City Southern Railroad v. Waters*, 120 Okla. 1, 249 P. 742, the court held a refusal to admit a photograph into evidence to be reversible error, saying, *inter alia*:

“ * * * The extent to which the underbrush and peach orchard affected plaintiff’s visibility of the approaching train was a material question in the trial of the case. * * * ”

It is most respectfully submitted that the question decided in the instant case is identical with the appellants’; that the visibility of which the court speaks therein is analogous to the proposition of the officers’ ability or lack or ability to discern from their seated position in their car at the time, number slips and numbers books in the rear compartment of the automobile of the defendant Coupe, thereby making the photographs material and proper, and their exclusion ample reason for the reversal of this judgment. And inasmuch as the officers had testified that such was within their ken, admission of the photographs was material and important as a mode of attack upon their credibility, and that their exclusion should thereby, by this Honorable Court, constitute reversible error.

IV.

That the Trial Justice's general attitude throughout the trial indicated the prevalance of bias: that such reflected the infusion of judicial personality, thereby prejudicing the rights of the defendants.

While adducing his proof, counsel for the appellants directed a question to one of the witnesses, the Court stopping counsel, taking the position that the question was leading. The Assistant United States Attorney had interposed no objection to it. Counsel called the Court's attention to the fact that he had not completed the query, stating that the Court could not anticipate its import until its completion. Objection was made to the denial of the right to complete the question; the same being overruled, with exception noted. (R. 18.)

During the Government's cross-examination of a defense witness, it was contended that he had testified differently with respect to the particular matter on direct examination. Counsel for the appellants objected, presenting that such was not the former testimony, and before making any further statement, the Court said: "Don't you tell that witness what to say." Counsel assured the Court that such had not been his purpose or desire: that he simply felt that it was of the first importance that there be no confusion as to what *was said*.

At this time Counsel objected to the general attitude of the Court, presenting that it had demonstrated definite opinion and prejudice with respect to the matters and persons under investigation; that it was manifest that the Court had formed a conviction that the appellants were guilty; and that it appeared most improbable his clients would receive a fair and impartial trial

in his Court. At this time it was moved that the Court withdraw a juror and continue the case. The motion was overruled, with exception noted. (R. 19.)

Too, while examining a subsequent witness for the defense, counsel for the appellants, in the interest of saving time, sought to direct the person testifying to a certain day: the date was in evidence, the Government's attorney having been afforded this right during his examinations—and was admonished by the Court not to direct the witness' attention to the date in question. See *Grock v. United States*, 289 Fed. 544, 53 App. D. C. 146.

In *Egan v. United States*, 287 Fed. 958, 52 App. D. C. 384, this Court said:

“Numerous other exceptions to the conduct of the trial judge in ruling upon the admissibility of evidence and commenting thereon in the presence of the jury. In other words, these exceptions challenge the demeanor of the judge towards the defendant. While there is perhaps no single instance involving error so prejudicial as to warrant reversal, we are convinced that, considered as a whole, the rights of the defendant were so prejudiced thereby as to deprive him of a fair and impartial trial which the Constitution and the law of the land accords to every citizen accused of the commission of crime. *The trial judge should be so impartial, in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused.*” (Italics Appellants’.)

Too, in the case of *In re: Gassenheimer*, 24 App. D. C. 312, this Court said:

“The provinces of the judge and jury are well defined, and an act of usurpation committed by

the judge, as well as any error of law or procedure, may be excepted to and made the subject of review on appeal, where it can be corrected."

Then in *Grock v. United States, supra*, it was expounded:

"An attorney at law appearing in open court in the trial of a criminal case, is entitled to such treatment from the court that the interests of his client may not be prejudiced, as a matter not of indulgence but of right." *Henry v. United States*, 273 Fed. 330, 50 App. D. C. 366.

V.

That the motion to withdraw a juror and declare a mistrial should have been granted for reasons delineated and authorities cited in Assignment 4, *supra*.

VI-A.

That the motions for directed verdicts of not guilty made on behalf of both defendants with respect to each count of the indictment should have been sustained; for had the photographs offered by the appellants been admitted into evidence, they would have clearly shown the impossibility of the officers observing, from their seated position in their car, number slips and numbers books in the rear compartment of the automobile of the appellant Coupe, and in consequence such seizure would have been illegal.

See reasons delineated and authorities cited in Assignment 3, *supra*.

VI-B.

That under either Section 863, as amended, or 863a of the Code of Laws of the District of Columbia, proof of possession of number slips and numbers books is sufficient, and it was not incumbent upon the Government of the United States to establish proof of some additional fact; in consequence of which their conviction under these two distinct statutory provisions operated as of necessity of twice convicting each defendant for the same offense.

It is herewith respectfully argued that the purpose of a criminal statute is to create by the legislative authority a penalty remedial in nature and essence by which a person may be formally confronted by charge and brought to account for the criminal offenses which it is alleged that he has committed. That it would be monstrous to penalize him for but a mere series of words; that it would be justice if the authority punished him for but such offenses which arose from his criminal act.

Admittedly, more than one offense may arise from the same illegal act.

Perforce, it is earnestly solicited of this Honorable Court that the criminal offenses, if any, and only them, be considered.

Section 863, as amended, of the Code of Laws of the District of Columbia, makes the *possession* of number slips *prima facie*, a felony; and the person so possessing may be deemed to be concerned as an owner, agent and clerk in the managing, carrying on, promoting and advertising a certain lottery; Section 863a makes the same thing—possession of number slips—

a misdemeanor. The former, with respect to the proposition that the mere possession of number slips may be presumptive evidence of the commission of that crime, is interpreted and apparently settled by *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 583; 24 Sup. Ct. 372, in which the Court said:

“* * * The provisions of Sections 344a, and 344b, of the Penal Code of New York making the possession of policy slips by a person other than a public officer presumptive of possession knowingly in violation of law are not violative of the Fourteenth Amendment, are not unconstitutional as depriving a citizen of liberty or property without due process of law, and do not, on account of the exception as to public officers, deprive him of the equal protection of the laws. * * *”

But in the instant case, the Government of the United States pursuant to what the appellants Edward Coupe and Henry Lynch respectfully submit was an illegal search of their persons and property, and as such a violation of their rights as citizens, proved but, and only the mere possession of number slips and numbers books; the Government of the United States charged and convicted Edward Coupe and Henry Lynch under two distinct statutory provisions of committing the, and only the crime of possessing number slips and numbers books, in consequence of which it is hereinafter presented that they were each twice put in jeopardy for the same offense.

In *Sims v. Rives*, 84 Fed. (2nd) 871, 66 App. D. C. 24, the recent exposition of this principle by this Court, it was held that a conviction for violation of the Liquor Taxing Act after conviction for violation of the District of Columbia Alcohol Beverage Control Act, in-

volving same transportation of same liquor, did not constitute double jeopardy within the meaning of the Constitution, since different evidence was required to support conviction under each act. Too, the opinion states, counsel for the appellant relied upon *Grafton v. United States*, 206 U. S. 333, 51 L. Ed. 1084, 27 Sup. Ct. 749, but says with respect to it:

“This case is not determinative of the question here; it is distinguishable for the reason that *identical evidence* would have supported a conviction upon either of the charges.” (Italics Appellants’.)

This is the precise position of the appellants in their case at bar: that identical evidence would, indeed did, support these convictions both under Section 863, as amended, and 863a.

Perhaps the leading case in the United States of America upon the subject of *autrefois convict* is *Morey v. Commonwealth*, 108 Mass. 433, decided in 1871. In *Sims v. Rives*, *supra*, quoting from *Gavieres v. United States*, 220 U. S. 338, 55 L. Ed. 489; 31 Sup. Ct. 421, it was expounded by this Court:

“It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of the opinion that while the transaction charged is the same in each case, the offenses are different. This was the view taken in *Morey v. Commonwealth*, (*supra*), in which the Supreme Judicial Court of Massachusetts, speaking by Judge Gray, held:

“‘A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sen-

tence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other'." (*Italics Appellants'.*)

In the case at bar, the evidence required to support a conviction under either Section 863, as amended, or 863a would have been sufficient to warrant a conviction under the other, *neither statute requiring proof of some additional fact.*

In *Sims v. Rives, supra*, and *Gavieres v. United States, supra*, it was necessary in order to make out the subsequent convictions properly, to prove in the former case the absence on the liquor containers of the revenue stamp; in the latter case it was essential to conviction that the prosecution establish that the outrage, insult or threat, was addressed to a public official.

In the *United States v. Houston*, 4 Cranch C. C. 267, the Court had this to say:

"The rule that the doctrine only applies when the two prosecutions are for the same crime must be taken with this qualification, that where one crime is included in and forms a necessary part of another, and is but a different degree of the same offense, and where on the prosecution for the higher a conviction may be for the lower, then a conviction or acquittal for the higher will bar a prosecution for the lower."

“Or,” as was decided in *Fox v. State*, 50 Ark. 528, “for a crime of which the lower is an essential ingredient.”

The essential ingredient.

Possession of number slips and numbers books.

In the case of *Nielson, Petitioner*, 131 U. S. 176, 33 L. Ed. 118; 9 Sup. Ct. 672, it was found by the Supreme Court of the United States that the petitioner Nielson had been indicted on the same day under two statutes (as were the appellants): one making it an offense to cohabit with more than one woman; the other providing a penalty for the commission of the offense of adultery. Nielson pleaded guilty to the former charging unlawful cohabitation, then pleaded this conviction when confronted with the latter. The district attorney demurred orally; it was sustained, and Nielson was convicted before a jury and sentenced to one hundred and twenty-five days in jail,

The Court said *inter alia*:

“* * * and assuming this to be true, can it be doubted that the adultery charged in the second indictment was an incident and part of the unlawful cohabitation * * * to convict and punish him for that was a second conviction and punishment for the same offense. * * * We think so because the material part of the adultery charged was comprised within the unlawful cohabitation of which the petitioner was already convicted. * * *” See, too, *Copenhagen v. State*, 15 Ga. 264; *State v. Cooper*, 13 N. J. L. 361; also *Triplett v. Commonwealth*, 84 Ky. 193.

It is interesting to note in the above case the language of the Supreme Court of the United States in commenting upon the prosecution's reliance upon *Morey v. Commonwealth*, *supra*, distinguishing it:

“* * * We think, however, that the case is distinguishable from the present. The crime of loose and lascivious association and cohabitation did not necessarily imply sexual intercourse, like that of living together as man and wife, though strongly presumptive of it. But be that as it may, it seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the offense.”

In North Carolina it has been held that if the acts alleged in the second indictment are embraced in the charge contained in the first, *and have been given in evidence to procure the first conviction, and increase the punishment*, the first conviction is a bar to any second prosecution for those acts. *State v. Lindsay*, 61 N. C. 468. (Italics Appellants’.)

In *State v. Cooper*, *supra*, an early New Jersey case, which when this subject of double jeopardy had been discussed by the courts of this country in the past has been afforded great respect for its profoundness, it was expounded:

“A conviction upon an indictment for burglary, is a good plea, in bar, on a trial for robbery, if the circumstances of the robbery, were put in proof, in order to make out a case for which the prisoner was tried and convicted on the first indictment; because in such case, the robbery constituted a part of the same transaction for which the prisoner was first tried. But if a new trial be afterwards granted, in the case for burglary, such acquittal on the charge of robbery cannot operate in bar of another trial on an indictment for burglary, as the circumstances

of the burglary were not involved in the charge of robbery.”

In *United States v. Lee*, 4 Cranch C. C. (4 D. C.) 114, it was said:

“If the note was in a pocketbook at the time the defendant stole the pocketbook, a conviction of stealing the pocketbook is a bar to a subsequent indictment for stealing the note.”

And in *Nordlinger v. United States*, 24 App. D. C. 406, this Court said:

“In a plea of former acquittal, the test of the identity of offenses is whether the facts necessary to conviction under the second indictment would have been sufficient, if proved, to have warranted a conviction under the first indictment.” See, too, *Monroe v. United States*, 10 Fed. (2d) 645, 56 App. D. C. 80.

For strict construction of a lottery statute, this Court is directed to *France v. United States*, 164 U. S. 676, 41 L. Ed. 595, 17 Sup. Ct. 219; and *Francis v. United States*, 188 U. S. 375, 47 L. Ed. 508, 23 Sup. Ct. 334.

The appellants respectfully request of this Honorable Court its consideration of the *People v. Babdaty*, 30 P. (2d) 634, 139 Cal. App. (Supp.) 791, decided in 1934 by the court of last resort of the State of California. In that case one Albert Babdaty was convicted on four counts of an information, and he appealed.

A conviction was had on count I for violation of Penal Code Section 320, the same contemplating the illegal possession of gaming devices; on a second for

violation of Section 330; on a third charging the keeping and maintaining a place where a certain game was played; and on a fourth count charging a violation of an ordinance of the city of Los Angeles prohibiting the possession of instruments, devices and objects used and intended to be used in contriving, preparing, setting up, and drawing a lottery.

The Court said:

“A charge closely related to the first count was made in count IV. Here the violation of Section IV of the Los Angeles City Ordinance No. 37737 was alleged, that section prohibiting the possession of instruments, devices and objects used and intended to be used in contriving, preparing, setting up, and drawing a lottery. *As the evidence which revealed the possession of the means whereby a lottery was conducted also revealed that it was conducted*, this case falls squarely within the rule that one may not be convicted and sentenced for a crime and also be convicted and punished for an act which is an *incident of such crime*. (Italics Appellants’.) For example it was held in *People v. Clement* (1929), 208 Cal. 142, 280 P. 681, that one convicted and sentenced because he operated a still could not also be punished for *possession of the still*. For other applications of the principle see *People v. Buchanan* (1929), 106 Cal. App. (Supp.), 765, 288 P. 50, and *In re Crawford* (1930), 109 Cal. App. 33, 292 P. 520. The acts alleged in count IV, may not stand.”

And further, the court said:

“We must reach the same conclusion with respect to count III, under which the appellant was charged with keeping, conducting and maintaining a place where a game, not mentioned in Sections 330 and 330a of the Penal Code was played.

Whatever else may be said of this count, at best it charges but another incident of the same public offense as that alleged in count I. In so far as the judgment is based on count III, it is without foundation."

And the court concludes with:

" . . . So far as counts 2, 3, and 4, therefore, the judgment must be reversed with directions to the trial court to dismiss the case as to those counts, and it is so ordered. . . . As the fine on count II has fallen, the sentence on count I should, therefore, be set aside with directions to the trial court to arraign appellant for judgment and thereupon render a new and proper judgment."

In *Blockburger v. United States*, 284 U. S. 299, 76 L. Ed. 306; 52 Sup. Ct. 180, is to be found a contribution to the *stare decisis* of *autrefois convict* by a reiteration of the principle laid down in *Morey v. Commonwealth*, *supra*.

From the opinion:

" . . . The indictment contained five counts. The jury returned a verdict on the second, third and fifth counts only. Each of these counts charged a sale of morphine hydrochloride to the same purchaser.

"The Court sentenced petitioner to five years imprisonment and a fine of \$2000 upon each count, the terms of imprisonment to run consecutively. 50 Fed. (2d) 795.

" . . . The sales charged in the second and third counts, although made to the same person, were distinct and separate sales made at different times. It appears from the evidence that shortly after the delivery of the drug which was the subject of the first sale, the purchaser paid for an additional quantity, which was delivered the next day. But the first sale had been consummated, and payment

for the additional drug, however closely following, was the initiation of a separate and distinct sale completed by its delivery.

"Each of the offenses created requires proof of *an additional element*. The applicable rule is that where the same act or transaction constitute a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires* proof of a fact which the other does not. (*Italics Appellants'*) *Gavieres v. United States*, 220 U. S. 342, 55 L. Ed. 489; 31 Sup. Ct. 421; and authorities cited."

The Government of the United States proved but the mere possession of number slips and numbers books; however, under neither Section 863, as amended, or 863a was proof of an additional fact required. *Adams v. New York, supra*. Therefore, it is respectfully submitted that under the *Blockburger Case* *two offenses could not have been committed*. *Sims v. Rives, supra*.

VII.

That the Trial Justice's instruction in regard to the jury's reception of the character testimony adduced in support of the defense of the appellant Coupe, by stating that it was "persuasive, but not compulsory," was misleading and confusing, thusly prejudicial, hence erroneous. *Egan v. United States, supra*.

Too, that the character witnesses should have been permitted to testify as to the reputation of the co-defendant Coupe for truth and veracity within the particular community.

Inter alia, with respect to the six character witnesses produced on behalf of the appellant Coupe, (Lynch did not take the stand) the Court in its instructions to the

jury charged that character testimony "is persuasive, but not compulsory"; preceding it with: "that even if it was not of so high a grade, still it was important evidence on behalf of the defendant—" (R. 20.)

The appellant Coupe respectfully submits for the consideration of this Honorable Court, this interrogation:

"Was the Trial Justice desirous of conveying by way of instruction 'that even if it was not of so high a grade, still it was important evidence—that is, that it was persuasive, but not compulsory': that the testimony of the six character witnesses was of low grade? Or did it have in mind what a court expounded in State v. Maharras, 208 Ia. 127 (1929), 224 N. W. 537, to the effect that 'opinion evidence is of the lowest grade,' and that it should be afforded by it but corresponding consideration?"

In either event, it is herewith argued that such instruction at best could be but confusing to the jury, was unfair and unreasonable, in consequence prejudicial, and should, with respect to the appellant Coupe, constitute reversible error. *Egan v. United States, supra.*

As this Court expounded in *Jones v. United States*, 289 Fed. 536, 53 App. D. C. 138:

" . . . that the fact of the defendant's good reputation should be considered along with the other evidence of the case."

It is respectfully submitted that under the authorities the jury should have been instructed that they were to consider the character testimony adduced in support of the defense of the appellant Coupe along with the other evidence in the case, not merely informed that they may consider it.

Permission was granted the six character witnesses to testify out of order: they answered that they were familiar with the reputation of Coupe within the community for peace and good order: that it was very good. In conjunction with this, it was similarly inquired of them if they were familiar with his reputation for truth and veracity. This was objected to; sustained, with exception noted. (R. 19.)

It is true that at the time the defendant's truth and veracity had not been impeached; but this was inquired of them by counsel with the thought in mind that it would be. Coupe had testified that he did not give the key to the rear door of his car, to Lynch; also that he did not say that he was going to "take the number slips to Maryland." He was attacked on cross-examination by purported inconsistent statements; too, by the testimony of rebuttal witnesses in regard to these two matters to the effect that he had stated conversely at the time of his arrest. In a word, both on cross-examination and by the testimony of rebuttal witnesses, was this effort to impeach Coupe emphasized. Upon this principle it is contended that the offer was proper. And if the evidence was material, its exclusion was error. *Cohen v. United States*, 291 Fed. 368, from which opinion it is displayed, that:

"... Several witnesses were called by his counsel for the announced purpose of proving that Cohen bore a good reputation for truth and veracity and honesty. No testimony to that effect was received in evidence . . . Counsel correctly stated the importance of this testimony to the defense. The Court stated that he understood what counsel was trying to do; and excluded the proffered testimony solely upon the ground that the questions were not put in proper form. The substance was too vital to be sacrificed to form."

One of the leading cases upon this subject is *First National Bank v. Blakeman*, 19 Okl. 106, 12 L. R. A. (N. S.) 364, 91 P. 868. Upon an exhaustive investigation of this principle Chief Justice Burford finds that the authorities are irreconcilable; but states four (4) grounds upon which it is proper to introduce character testimony as to truth and veracity. **FIRST**, when there has been a direct attack upon the character of the witness by offering evidence that his reputation is bad; **SECOND**, when there has been shown particular acts of criminal or immoral conduct either on cross-examination or by introduction of his record; **THIRD**, through impeachment by evidence of corruption on the part of the witness in connection with the case in which he appears; and, **FOURTH**, by impeaching the witness by evidence of contradictory or inconsistent statements admitted on cross-examination or shown by testimony of other witnesses.

It appears that with the fourth corollary the authorities are in conflict: but the better rule seems to be that in such instances evidence of the witness' reputation for truth and veracity, is proper.

VIII.

That the Trial Justice prejudiced the rights of the appellants when he interrupted the deliberations of the jury by recalling it and instructing them in the so-called "Allen charge," being the authority established in *Allen v. United States*, 164 U. S. 493, 41 L. Ed. 528; 17 Sup. Ct. 154.

At the outset of the Court's instructions to the jury, the Trial Justice apologized at length for his conduct during the course of the trial. It is herewith respectfully argued that such did operate as an admission of the installation of his opinion in the minds of the mem-

bers of the jury as to the guilt of the appellants: that it clearly showed his failure to accord the defendants, in contemplation of the whole course of the tribunal's inquisition, a fair and impartial trial to which the Constitution of the United States and the laws of the land entitled persons charged with the commission of crime. *In re Gassenheimer; Egan v. United States; Grock v. United States (all supra)*. The jury took the case at 4:30 P.M. It was then agreed between Court and counsel that they be permitted to return a sealed verdict. Counsel for the appellants informed the Court at the time that he would send a young man from his office to receive the verdict, if it was not too late. Within but a few minutes, the law clerk of counsel for the appellants went to the office of the Assistant United States Attorney who had been in charge of the prosecution. Together they went to the chambers of the Trial Justice. It was stated by the Court that it intended to recall the jury and inform them that a sealed verdict could be returned; also to admonish the members that if they were unable to reach a decision by 8 P. M., they would be locked up for the night. The Court then inquired if there was any objection to instructing the jury at the same time with the "Allen charge." Counsel for the Government replied in the negative. The law clerk, not being familiar with the instruction, and being sent by counsel simply and exclusively to take the verdict, likewise acquiesced. The jury was then recalled and, without counsel for the appellants being in attendance, was presumably instructed in the law laid down in *Allen v. United States, supra*.

From the opinion:

"The seventeenth and eighteenth assignments were taken to the instructions given to the jury

after the main charge was delivered, and after the jury had returned to the court, apparently for further instructions . . ." (Italics Appellants'.)

The jury returned a verdict of guilty against each appellant upon both counts of the indictment a few minutes before 8 P. M.

It is herewith submitted that the "Allen charge," being the authority under *Allen v. United States, supra*, and being instructions taken from *Commonwealth v. Tuey*, 8 Cush. 1, (Mass.) and the Supreme Court of Connecticut in *State v. Smith*, 49 Conn. 376, 386, was meant to be properly given only when the jury had returned to the courtroom requesting further instructions; or, extracting therefrom its broadest interpretation, only correct when in an instance the jury had deliberated for an extended period and had returned to the courtroom expressing their inability to agree upon a verdict.

It is presented that when the Court recalled the jury after the members had deliberated for but a short time, and informed them that should they not reach a verdict by 8 P. M. they would be locked up for the night, together with instructing them in the "Allen charge," it prejudiced the rights of the appellants by transgressing the offices of the jury, and that such should constitute reversible error. *In re Gassenheimer, supra*.

IX.

That the defendants motion for a new trial should have been granted (R. 7, 8); and for the reasons therein presented, together with such fuller exposition and delineation as is manifested from the composition of this record.

X.

That the Court erred in imposing sentence upon each of the appellants with respect to both counts of the indictment for the reasons in toto, supra.

The Court sentenced Edward Coupe for a period of Six (6) months to One (1) year and One (1) day on count one of the indictment, and for a period of Six (6) months on count two of the indictment, said sentences to run concurrently; the Court sentenced Henry Lynch for a period of Three (3) months to Six (6) months on count one of the indictment, and for a period of *Five (5) months on count two of the indictment*, said sentences to run concurrently. (R. 9.)

It is to be observed that a greater sentence was imposed upon Henry Lynch, with respect to count two, than upon Edward Coupe.

CONCLUSION.

Upon an incisive examination of the record herein, and in contemplation of the authorities advanced, it is respectfully contended that the appellants Edward Coupe and Henry Lynch were not afforded a fair and impartial trial which the Constitution of the United States and the Laws of the Land accord every citizen charged with the commission of crime; too, that being sentenced under two distinct statutory provisions, neither of which required proof of an additional fact, they were twice put in jeopardy for the same offense: and for such reasons the judgment of the District Court of the United States, holding a Special Term as a Criminal Court should, therefore, be reversed.

Respectfully submitted,

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Attorneys for Appellants.

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA

FILED JAN 17 1940

No. 7446

Joseph W. Stewart

**In the United States Court of Appeals for
the District of Columbia**

JANUARY TERM, 1940

EDWARD COUPE AND HENRY LYNCH, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

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In the United States Court of Appeals for the District of Columbia

JANUARY TERM, 1940

No. 7446

EDWARD COUPE AND HENRY LYNCH, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The appellants were convicted in the District Court of the United States for the District of Columbia on an indictment in two counts charging them with violations of Sections 863 and 863a of the Code of Law of the District of Columbia. The first count charged that the appellants unlawfully "were concerned as owners, agents, and clerks in managing, carrying on, promoting, and advertising a certain lottery, commonly known as and called the numbers game." The second count charged that the appellants unlawfully possessed certain writings, used and adapted for the purpose of playing and carrying on the numbers game.

Facts

The inadequacy of the statement of facts in the appellants' brief makes necessary the following summary of so much of the proceedings and evidence as is contained in the bill of exceptions:

(1)

Two police officers, George C. Deyoe and William McEwen, acting upon certain information received by them the preceding day, went to 30th and M Streets NW., in the District of Columbia, where they observed Coupe driving south on 30th Street. They followed his automobile, falling in directly behind an intervening automobile. Coupe's automobile stopped in front of 1062 30th Street NW., and, as they neared the rear of the intervening car, Lynch approached carrying a brown paper bag. Lynch engaged Coupe in conversation for a moment, obtained from him a key to the rear compartment of Coupe's car, and went to the rear of the car, unlocking the rear compartment door. As the intervening car passed Coupe's car, Lynch raised the lid of the rear compartment. The officers thereby obtained a clear view of the interior of the compartment and saw therein a large paper box, the top of which had been torn open. Inside the box they observed a large number of paper pads of a type they knew were used by numbers writers (R. 14).

Both appellants thereupon were placed under arrest and taken to Police Headquarters where they were formally charged with violations of Sections 863 and 863a of the Code of Law for the District of Columbia. McEwen who drove Coupe's car to Police Headquarters saw through a crack between the closed door of the glove compartment and the dashboard what he thought to be numbers slips. Thereupon, he searched the car and found a quantity of slips in the glove compartment and several thousand numbers slips in the rear compartment of the car (R. 15). All the numbers slips seized by the officers were admitted in evidence (R. 16).

The question of the legality of the seizure of the numbers slips was raised on behalf of the appellants, both by preliminary hearing to suppress and by objection to their admission during the trial. On both occasions (the second time, after the jury had been excused temporarily) the two police officers testified in addition that the information upon which they acted was received from a source they had hitherto found reliable and was that a 1937 Lincoln Zephyr automobile, bearing District of Columbia tags 117-297, owned and operated by Coupe was engaged in the numbers racket, picking up num-

bers slips at various locations in the Georgetown section in the District of Columbia, one of these locations being in the 1000 block of 30th Street NW., where Coupe in the above-described car, would receive a large quantity of numbers slips each day between 12:45 P. M. and 1 P. M. from a colored man who would place the numbers slips in Coupe's car. They testified further that when they saw Coupe the next day he was driving the car described by their informant and that he stopped at the place where they had been told he would stop at about 1 o'clock (R. 14).

The case first was called for trial on March 3, 1939, and was continued to April 6, because it could not be reached on the calendar. On April 6th it was continued to April 18th for the same reason, and on April 18th the attorney for the appellants stated to the Court that he desired a continuance because he was unable to procure the services of a stenographer to report the testimony. The trial justice thereupon continued the case to April 27th. On April 27th the attorney for the appellants again requested a continuance because he said he again had been unable to procure the services of a stenographer to report the testimony. The Court refused to permit the continuance, and the case went to trial.

During the trial two photographs showing different views of a Lincoln Zephyr car were offered in evidence on behalf of the appellants whose counsel told the Court that the pictures represented an automobile of the same model as Coupe's car. It was not contended that the pictures showed Coupe's automobile and no testimony was offered to that effect. A salesman of Lincoln Zephyr cars, testifying for the appellants, said that the car shown in the photographs was of the same model and type as Coupe's car. He testified that when the rear compartment door of the model and type of car shown in the photographs was opened the spare tire swung automatically into an upright position such as was shown in one of the photographs. Upon objection by the Government, the photographs were not allowed to be introduced in evidence (R. 17).

A motion to withdraw a juror on the ground that the Court had indicated a definite opinion and prejudice with respect

to the appellants was made and overruled after the following had occurred:

During the course of the Government's cross-examination of a defense witness, counsel for the Government recited certain facts and asked the witness whether he had not testified in such a fashion on direct examination. Counsel for the defense objected, stating that such was not the former testimony. The Court then said to the defense counsel: "Don't you tell that witness what to say."

Earlier, defense counsel had objected to the attitude of the Court when the Court stopped him before he could complete a question he had propounded to a witness, the Court saying that the question was leading (R. 18).

At another point during the trial, subsequent to the denial of the motion to withdraw a juror, the Court admonished defense counsel not to direct a witness' attention to a certain date. Counsel had asked the witness whether or not Coupe's automobile had been at a certain place at that time. Counsel for the defense objected to the Court's action on the ground that the prosecutor had been allowed to mention dates in order to expedite proceedings.

Six character witnesses testified that Coupe enjoyed a good reputation for peace and good order. Upon objection by the Government, they were not permitted to answer questions concerning Coupe's reputation for truth and veracity. Coupe's reputation for truth and veracity had not been impeached (R. 19).

At the beginning of its charge to the jury, the Court stated that it had the highest regard for the ability and character of the defense counsel and that it considered he had conducted the case in a proper and ethical manner (R. 20).

During the course of its charge to the jury, the Court stated, among other things, in substance, that it was the Court's function to decide all questions of law, but that it was the jury's exclusive function to decide all questions of fact; that if anything that the Court had said or done during the course of the trial had led the jury to believe that the Court had formed an opinion as to the facts of the case or as to the guilt or innocence of the accused, the jury should disregard such

belief; that the jury were the sole judges of the facts; and that they should form their conclusions solely from the evidence. The Court stated further that the circumstances of a case might be such that an established reputation for good character alone would create a reasonable doubt, although without it the other evidence in the case might be convincing; that the jury had heard the testimony concerning the appellant Coupe's reputation and that it was for them to say whether it was such as in itself would create a reasonable doubt in their minds as to his guilt; that even if it was not of so high a grade, still it was important evidence on behalf of the appellant. that is, evidence of good character was persuasive but not compulsory (R. 20).

Counsel for the Government and for the defense agreed upon a sealed verdict. The jury retired at 4:30 P. M. When they had deliberated about an hour the Court recalled them and instructed them as to the mechanics of returning a sealed verdict and the clerk gave them a form for such a verdict. The Court also delivered to the jury at this time the so-called Allen Charge as approved by the Supreme Court in the case of *Allen v. United States*, 164 U. S. 493, 17 S. Ct. 154, 41 L. Ed. 528. The jury had not requested any further instructions, and the trial counsel for the defense was not present in the courtroom at the time, but was represented by an office associate who was told that the Court proposed to give the Allen Charge, and made no objection thereto (R. 20, 21).

The attention of the Court is called to the statement in appellants' brief at page 3, wherein it is said that Deyoe and McEwen refused to divulge the source from which they had obtained their information concerning the appellant Coupe's activities. Nothing to this effect is contained in the record, and it is submitted that they were not asked to make such a disclosure (R. 14).

Attention also is called to the statement on page 3 of appellants' brief that the two police officers testified that the side of the paper box they observed in the rear of Coupe's car was torn, while in fact the box, when introduced at the trial, was not torn. Nothing to this effect is contained in the record, and it is submitted that the officers testified that the top of the

box was torn open, which testimony was borne out by the box itself when introduced in evidence.

Another divergence from the record in appellant's brief is on page 5, where appellants state that the Assistant United States Attorney in charge of the prosecution had sought the services of a stenographer on April 27th, the date the trial began, but that none was available. There is nothing in the record to support this assertion, and the incident did not occur.

STATUTES

The following are the relevant parts of the statutes involved in this appeal:

Act of April 5, 1939, c. 72, 52 Stat. 198, Sec. 863.
Code of Law of the District of Columbia:

"If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a price, to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and

place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery."

Act of April 5, 1938, c. 72, 52 Stat. 198, Sec. 863a of the Code of Law of the District of Columbia:

"If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than \$500 or be imprisoned for not more than six months, or both."

SUMMARY OF ARGUMENT

I

Admission in evidence of the property seized from appellant Coupe's car was proper.

II

Refusal of the trial justice to grant a continuance was a discretionary matter which should not be reviewed.

III

Exclusion of the photographs of the car similar to that of the appellant Coupe was proper.

IV

The conduct of the trial justice was free from bias and prejudice.

V

A distinct and separate offense was stated in each count of the indictment, and conviction and sentence on each count was proper.

VI

There was no error in the Court's instruction regarding character testimony nor in the exclusion of testimony concerning appellant Coupe's reputation for truth and veracity.

VII

The time when a jury may be instructed in the language approved in *Allen v. United States*, 164 U. S. 493, 17 Sup. Ct. 154, 41 L. Ed. 528, is discretionary with the trial Court and is not subject to review.

ARGUMENT

I

Admission in evidence of the property seized from appellant Coupe's car was proper

Appellants' argument that the Court erred in overruling a motion to suppress the evidence and in admitting the numbers slips found in appellant Coupe's car apparently does not deny that the facts testified to by the Government's witnesses constitute probable cause for the arrest and seizure, but asserts only that the judge, who heard the motion to suppress, and the trial justice should not have taken the testimony of the Government's witnesses at face value because of alleged contradictions therein. There can be no doubt that the officers had probable cause to believe the appellants guilty of committing a felony, if it be conceded that the facts are as the two policemen related them.

Husty et al. v. United States, 282 U. S. 694, 51 S. Ct. 240, 75 L. Ed. 629.

Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543.

In the *Husty* case the arresting officers had received information that the defendant's automobile would be at a certain place at a certain time with a load of illegal whiskey.

They went to the place described by their informant and found the car and the defendant there. The defendant was known to them to bear the reputation of being a bootlegger. They thereupon arrested him and seized the liquor in his car. The Supreme Court found these facts to constitute probable cause for the arrest. In the instant case, the arresting officers had similar information which received similar corroboration from subsequent events. In addition, they saw pads of paper, such as are used by numbers writers, in Coupe's automobile, which lends additional strength to the grounds for their belief that Coupe was engaged in some way in the carrying on of the numbers game.

If the argument under this point be confined to the narrow ground first stated, which seems to be the basis of the appellants' contention, it is equally apparent that it is without merit.

Marsh v. United States, 29 F. (2d) 172 (C. C. A. 2), cer. den. 277 U. S. 611, 48 S.Ct. 563, 72 L. Ed. 1015.

Baldwin v. United States, 5 F. (2d) 133 (C. C. A. 6), cer. den. 269 U. S. 552, 46 S. Ct. 17, 70 L. Ed. 407.

Malone v. United States, 67 F. (2d) 339 (C. C. A. 9).

Ah Fook Chang v. United States, 91 F. (2d) 805 (C. C. A. 9).

Huteson v. Esola, 59 F. (2d) 79 (C. C. A. 9).

Poetter v. United States, 31 F. (2d) 438 (C. C. A. 9).

United States v. Jankowski, 28 F. (2d) 800 (C. C. A. 2).

In the cases above cited the Courts announced the principle that findings of fact by trial Courts on conflicting and controversial evidence ought not to be disturbed by appellate tribunals.

In *Marsh v. United States*, *supra*, Justice Learned Hand considered the legality of a seizure of whiskey from an automobile by a New York State trooper, stating that the search and seizure provisions of the 4th Amendment applied even though the officer got his authority under the State law. Justice Hand said:

Carroll v. United States held that the pursuit and overtaking of a motorcar on mere suspicion of its containing liquors was an unreasonable search. We are,

therefore, first to determine whether the trooper overhauled the car for violation of a traffic ordinance. Upon that issue we see no reason to disturb the findings of the District Judge who alone was charged, as we held in *United States v. Jankowski*, with the duty of deciding the facts upon which the competency of the evidence depended. At the same time we must confess to considerable doubt whether, had the matter been before us in the first instance, we should have come to the same conclusion. The circumstances made the trooper's story somewhat doubtful, and an easy complaisance in any plausible tale may deprive defendants of their constitutional rights. This caution we are not, however, ourselves in a position to exercise, because, except in plain cases, we cannot tell from the cold record where the truth lies. For the future we take this occasion to press upon the District Judges that they search the testimony in such cases with care, remembering that the protection of defendant must in most cases rest finally with them.

Assuming, *arguendo*, that the testimony of Deyoe and McEwen was rendered doubtful by circumstances, still an appellate court should not substitute its judgment of the veracity of witnesses for that of the trial justice who has an opportunity to hear them and observe their demeanor. Justice Hand's admonition to trial justices to have a care in protecting the rights of defendants scarcely has any application to this case since there is nothing in the record to cause a just suspicion that the Government's witnesses told anything but the truth. Their testimony was passed upon at different times by two judges who accepted it without question.

II

Refusal of the trial justice to grant a continuance was a discretionary matter which should not be reviewed

This Court in *Tomlinson v. United States*, 93 F. (2d) 652, 68 App. D. C. 106, cer. den. 303 U. S. 646, 58 S. Ct. 645, 82 L. Ed. 1102, said that the refusal of the trial court to grant

a continuance was a matter within the Court's discretion and would not be reviewed in the absence of a showing of abuse of discretion. There clearly was no abuse of discretion here. The case was set for trial on four occasions. On the first two occasions it could not be reached on the calendar. The third time it was set, appellants' counsel obtained a continuance because he had been unable to secure the services of a stenographer to report the trial. A week later he requested another continuance for the same reason which the Court refused. No showing was made by the appellants' counsel that a court reporter could be obtained at any definite time in the future.

In *Baker v. United States*, 21 F. (2d) 903 (C. C. A. 4), the defendant protested against being compelled to go to trial the day after the finding of a reindictment, contending he had had insufficient time to prepare his defense. The Court said:

This Court in the case of *Pocahontas Distilling Company v. United States*, 218 F. 782, has stated the general rule with respect to motions for continuance to be that such motions are "addressed to the discretion of the trial court" and that their denial "constitutes ordinarily no ground for the reversal of a judgment. That the action of the trial court upon an application for a continuance is purely a matter of discretion and not subject to review by this Court unless it be clearly shown that such discretion has been abused is settled by too many authorities to be now open to question." *Isaacs v. United States*, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229, and authorities cited there.

To the same effect is *Crono v. United States*, 59 F. (2d) 339 (C. C. A. 9), in which case the Court said:

The action of the Court upon an application for a continuance is purely a matter of discretion and not subject to review unless it be clearly shown that such discretion has been abused. *Isaacs v. United States*, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229; *Warren v. United States*, 250 F. 89 (C. C. A. 8); *United States v. Rosenstein*, 34 F. (2d) 630 (C. C. A. 2).

The most recent statement of this proposition which counsel have found is in *Avery v. State of Alabama*, decided by the United States Supreme Court January 2nd, 1940. There the Court said:

In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.

Neither of the cases cited by appellants in connection with the denial of their motion for a continuance are in contradiction to the rule laid down in the *Tomlinson*, *Baker*, *Crono*, and *Avery* cases.

In *Home Insurance Company of Omaha v. Johnson*, 43 Neb. 71, 61 N. W. 84, the Court held there was no prejudicial error in the refusal of the trial justice to delay the trial until a reporter could be secured. After using the language quoted in appellants' brief, the Court went on to say:

In the case at bar, however, there was attempted no showing that by reason of the absence of the reporter the plaintiff in error was prevented from settling a proper bill of exceptions. What was proposed as a complete bill, showing all the evidence given and offered, was served on the defendant in error and settled by the judge who presided at the trial as in all respects full and correct. As to the ruling of the District Court as to the presence of a stenographer there was therefore no prejudicial error shown.

In the case of *Schoenfeldt v. State*, 30 Tex. App. 695, 18 S. W. 640, cited by appellants, the trial Court refused to appoint a stenographer to take down the evidence although there was one in the courtroom ready to serve and the defendant was ready to pay his fee. Nevertheless, the Court of Appeals held there was no showing of injury arising out of the Court's action and that the case should be affirmed.

III

Exclusion of the photographs of the car similar to that of the appellant Coupe was proper

The trial justice refused to admit in evidence the two photographs offered by the appellants, which showed a car of the same type as that driven by Coupe, for the reason that there was no showing made that the car depicted was in the same condition as Coupe's automobile. The sole purpose of offering them was to contradict the testimony of the witnesses Deyoe and McEwen that they were able to see into the rear compartment of Coupe's car before arresting him. Defense counsel contended that a spare tire in the automobile depicted in the photographs would have obstructed their vision. Since there had been no testimony that there was a similar spare tire in Coupe's automobile, to have admitted the photographs in evidence would have misled the jury. Certainly, then, it cannot be said that the trial justice was guilty of an abuse of discretion in excluding the pictures. The discretion of the judge in such matters is wide and should not be reviewed on appeal except in unusual circumstances. This principle of law has been stated many times by this Court. Among other cases, it found expression in *Mears v. United States*, 55 F. (2d) 745, 60 App. D. C. 387, where the Court said:

It is a familiar rule that the order of proof and general conduct of the trial is within the sound discretion of the trial court, and is not reviewable by an appellate court unless an abuse of discretion is clearly shown.

None of the cases cited by appellants in support of their contention that the pictures should have been admitted in evidence has any application to the facts of this case.

IV

The conduct of the trial justice was free from bias and prejudice

The appellants contend that the trial justice's general attitude indicated a bias which prejudiced the rights of the

appellants, and this contention is based upon three isolated incidents occurring during the trial. The first was the action of the Court in stopping defense counsel before he had been able to complete a question and in admonishing him not to lead the witness. There is nothing in the record which indicates that the admonition was not proper. Indeed, it was the duty of the Court in the interest of justice to forestall leading questions.

The second incident occurred when the Court admonished defense counsel not to tell a witness what to say. This Court must assume, in the absence of a showing to the contrary, that the admonition was needed.

The third incident occurred when counsel for the appellants attempted to direct a witness' attention to a certain date while seeking to elicit from the witness testimony in the nature of an alibi.

Later, to prevent the jury from receiving any impression from these three incidents which might have prejudiced them against the appellants, the Court took pains to instruct them that it had the highest regard for the ability and character of counsel for the defense and that it considered he had conducted the case in a proper and ethical manner. The Court further instructed the jury that they were the sole judges of the facts in the case and that if anything the Court had said during the course of the trial had led them to believe the Court had formed an opinion as to the facts of the case or as to the guilt or innocence of the accused they should disregard such belief. In view of this instruction the jury could not have drawn any inference unfavorable to the appellants from remarks made by the Court to the defense counsel. The argument of appellants that the judge's attitude furnishes ground for reversal, as was said by Justice Learned Hand in *United States v. Cotter*, 60 F. (2d) 689 (C. C. A. 2) "presupposes that we would reverse a judgment clearly justified by the evidence for trivial lapses made at the trial * * *. Criminal prosecutions are not to test the trial judge's adeptness in answering questions of law put to him in multitude, often in the heat of sharp discussion. Trials are to winnow the chaff from the

wheat; when the accused has had fair opportunity to answer the charge, when it has been lawfully proved and fair men have found him guilty, our duties end."

V

A distinct and separate offense was stated in each count of the indictment, and conviction and sentence on each count was proper

It is contended by appellants, in effect, that the Court should not have allowed the case to go to the jury on both counts of the indictment, since the evidence adduced in support of each count was identical.

Under the first count it was only necessary to prove that the appellants were engaged in some manner in managing, carrying on, promoting, or advertising a lottery. It was not necessary to prove that they possessed lottery slips. Under the second count it was necessary to prove that they knowingly possessed lottery slips. Evidence that they possessed lottery slips as players rather than as operators of a lottery would have been sufficient to sustain a conviction under the second count. The fact that possession of a lottery slip is made by statute *prima facie* evidence that the possessor then and there was engaged in carrying on a lottery does not obliterate the distinction between the two offenses. Mere possession is not enough to warrant a conviction under the felony charge contained in the first count. The jury must be convinced by all the circumstances of the case that the accused is guilty of participating in the carrying on of a lottery. If the other circumstances of the case clearly show that the accused possessed lottery slips innocently, or as a player, the jury could not reasonably convict. The effect of the statutory presumption is to permit a conviction where possession of lottery slips is unexplained or not satisfactorily explained, rather than to require a verdict of guilty upon proof of the mere fact of possession.

The appellants evidently misconceived the test regarding identity of offenses. They take the position that, if all the evidence actually adduced at the trial supports the conviction

on each of the counts, then the two counts are identical. The true test, however, is whether the same evidence is required to support each count; that is, whether the elements of the two offenses are the same or all the elements of one are included in the other. If there be one element in each offense not included in the other offense, the two crimes are not identical, and a conviction on each should be sustained. This question was discussed exhaustively by Justice Stephens of this Court in *Sims v. Rives*, 84 F. (2d) 871, 66 App. D. C. 24. In that case, the appellant contended he had been twice put in jeopardy by trial on an indictment charging violation of the Liquor Taxing Act after being convicted on an information in Police Court charging violation of the District of Columbia Alcohol Beverage Control Act. Both charges involved the same transportation of the same whiskey. Justice Stephens reviewed the leading cases on the subject, including *Gravieres v. United States*, 220 U. S. 338, 31 S. Ct. 421, 55 L. Ed. 489, which is cited in appellants' brief, and *Morgan v. Devine*, 237 U. S. 632, 35 S. Ct. 712, 59 L. Ed. 1153. From the *Gravieres* case he quoted, together with other language, the view expressed in *Morey v. Commonwealth*, 108 Mass. 433, as follows:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

From *Morgan v. Devine*, he quoted the Supreme Court as follows:

this court has settled that the test of identity of offenses is whether the same evidence is required to sustain

them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes.

and then concluded:

These cases control the instant situation. The evidence required to support the conviction of the defendant under the Beverage Control Act is different from that required to support a conviction under the Liquor Taxing Act. Under the Beverage Control Act, i. e., under subparagraph c of Section 17 of the Liquor Regulations prescribed thereunder, it would be necessary to prove that the defendant transported the liquor in question without having in his possession a bill or memorandum from the seller to the purchaser, and also that the defendant was transporting in excess of twelve quarts of liquor; but to support a conviction under the Liquor Taxing Act, it would not be necessary to make any showing as to the quantity of liquor, and it would be necessary to prove that there was not affixed to the container of the liquor the required revenue stamp.

VI

There was no error in the Court's instruction regarding character testimony nor in the exclusion of testimony concerning appellant Coupe's reputation for truth and veracity

The Court's instruction to the jury concerning the character evidence presented on behalf of the appellant Coupe was so obviously correct and proper that it is difficult to follow the portion of appellant's argument in which it is challenged as prejudicial. Although the trial court's exact words were not transcribed, the substance of his charge on this subject is preserved in the record as follows:

the circumstances of a case may be such that an established reputation for good character would alone create a reasonable doubt although without it the other evidence in the case might be convincing; that the jury

had heard the testimony on this subject on behalf of the defendant and that it was for them to say whether it was such as in itself would create a reasonable doubt in their minds as to the defendant's guilt; that even if it was not of so high a grade still it was important evidence on behalf of the defendant—that is, evidence of good character is persuasive, but not compulsory.

This instruction was given after the Court had charged the jury that they were the sole judges of the facts.

A portion of the character evidence instruction quoted above was taken verbatim from a requested instruction in *Jones v. United States*, 289 F. 536, 53 App. D. C. 138, which was refused and which this Court held should have been given. The instruction therein approved was as follows:

The jury are instructed that the circumstances of a case may be such that an established reputation for good character would alone create a reasonable doubt, although without it the other evidence would be convincing.

The same language again was approved by this Court in *Kinard v. United States*, 96 F. (2d) 522, 68 App. D. C. 250.

In the next part of the challenged instruction, the Court told the jury that they had heard the testimony on the subject of Coupe's character, and it was for them to say whether it was such as in itself would create a reasonable doubt in their minds as to his guilt. This obviously was intended to emphasize that the jury were the judges of the weight of the character testimony as well as of all other evidence presented. The conclusion of the instruction to the effect that evidence of good character was persuasive but not compulsory, still further emphasized that the jury were the sole judges of the facts.

The statement of the Court, that, even if the character evidence was not of so high a grade (as alone to generate a reasonable doubt as to the defendant's guilt), still it was important evidence on behalf of the defendant, was calculated to cause the jury to give serious consideration to the character

evidence, even though they were not convinced that the evidence fully established the defendant's good character.

Taken as a whole the instruction was most favorable to the appellant.

It also is cited as error that the Court excluded testimony that the appellant Coupe bore a good reputation for truth and veracity. The quality of character sought to be established by this evidence was not at issue in the case and hence the proposed testimony was irrelevant and could not properly have been admitted. It is established law that ordinarily the only purpose for which character evidence is admissible is to establish a general character inconsistent with guilt of the crime charged.

Edgington v. United States, 164 U. S. 361, 17 S. Ct. 72, 41 L. Ed. 467.

Morgan v. State, 88 Ala. 223, 6 So. 761.

People v. Cowgill, 93 Cal. 596, 29 Pac. 228.

Hays v. State, 110 Ala. 60, 20 So. 322.

People v. Stewart, 28 Cal. 395.

Kee v. State, 28 Ark. 155.

State v. Kinley, 43 Iowa 294.

State v. King, 78 Mo. 555.

State v. Pearce, 15 Nev. 188.

State v. Emery, 59 Vt. 88, 7 Atl. 129.

An exception to this rule is that a witness' reputation for veracity may be shown if his reputation as to that quality has been impeached. Counsel for appellants admit in their brief that at the time the testimony was offered, Coupe's reputation had not been attacked. It is submitted that their admission should dispose of this assignment of error.

VII

The time when a jury may be instructed in the language approved in *Allen v. United States*, 164 U. S. 493, 17 S. Ct. 154, 41 L. Ed. 528, is discretionary with the trial court and is not a subject for review

At the outset of the discussion under this point, attention of the Court is invited to the fact that no objection was made

either to the time or to the tenor of the Court's supplementary charge to the jury. It is true that the attorney who represented the defendants during the trial was not present, but an office associate appeared in his stead at his request and was qualified to act for him. Since no objection was made then, counsel for appellants should not be heard to object now. *Allis v. United States*, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91. In the *Allis* case, the Supreme Court said in a similar situation:

A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; * * *.

Attention of the Court also is called to two statements in appellants' brief that are not borne out by the record. One is to the effect that the trial court stated to counsel it intended to admonish the jurors that if they were unable to reach a verdict by 8 P. M., they would be locked up for the night. This remark was not made, nor did the Judge say anything of the sort to the jury. The other erroneous statement in appellants' brief is that the jury returned a verdict a few minutes before 8 P. M. Although not set out in the record, the facts are that the jury reported an agreement at approximately 8:20 P. M. and returned their verdict at 10 o'clock the next morning.

The gravamen of appellants' argument seems to be (1) that the Judge erred in recalling the jury without waiting for them to request further instruction, and (2) that the so-called Allen Charge should not have been given until the jury had deliberated for a longer period of time than one hour.

In answer, the appellee takes the position that the recall of the jury for the purpose of aiding it in its deliberations is within the sound discretion of the Court, and that the Allen Charge, far from being coercive, is merely definitive of the duties of jurors and may properly be given at any time. *Allis v. United States*, *supra*, and *Dwyer et al. v. United States*, 17 F. (2d) 696 (C. C. A. 2). In the first-named case the Supreme Court, considering an assignment of error that the

trial court erred in recalling the jury and giving them further instructions, said:

It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they were having in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at which such a recall shall be made, if at all, must be left to the sound discretion of the trial court, and there is nothing in the record to show that the Court, in the case at bar, abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given.

In *Dwyer et al. v. United States, supra*, the court of appeals considered the action of the trial court in sending for the jury and instructing them as follows:

Then there is just one other word I will say to you now, gentlemen, and that is that when in the jury room you want to be open-minded about matters, and listen to what the other fellow has got to say, and never stick to a thing just because you have said it. A wise man is always open to reason, to argument, and he never closes his ears to that, just because he has at one time made up his mind. You have heard all this evidence; you have listened to it carefully. The real question is whether these things happened, or any of them, that are vital to the case, or whether they did not happen, and whether these men entered into a conspiracy or conspiracies as charged, or whether they did not, and whether any of the overt acts stated in the indictment as to each count—any one of them—was or was not done, and whether you believe that beyond a reasonable doubt on the evidence, and, as I have said so often, it comes down to a question of whether it is

all a cock-and-bull story, made up by somebody for some reason or other, or whether it is a fact that has been testified to, or facts.

Concerning this instruction the Court of Appeals said:

there can be no doubt of the right of the Court to send for the jury and further instruct them at any time in the exercise of sound discretion. So much was held in *Allis v. United States*, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91; and such is the general rule in the State Courts (16 C. J., page 1087) * * *.

Nor is it error at any time to dwell upon the well-known and salutary rule in *Allen v. United States*, 164 U. S. 493, 17 S. Ct. 154, 41 L. Ed. 528, and upon the duty of jurymen to listen to each other's arguments and be persuaded to a decision by reason, rather than to prevent any decision by obstinate adherence to early principles.

The Allen Charge, itself, that is, the language specifically approved by the Supreme Court in the *Allen* case as distinguished from the Supreme Court's comments thereon, is manifestly designed merely to inform the jurors of their duties and of the deference they should give to the opinions of other jurors. Such an instruction would be suitable even before the jury retired to begin its deliberations.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be affirmed.

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